JAMES M. WILLIAMS AND HEIDI WILLIAMS, HUSBAND AND WIFE; AND JOANNE ALLEN AND KENNETH G. ALLEN, HUSBAND AND WIFE, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE, RESPONDENTS, AND BAXTER HEALTHCARE CORPORATION; SICOR, INC.; TEVA PARENTERAL MEDICINES, INC., FKA SICOR PHARMACEUTICALS, INC.; AND MCKESSON MEDICAL-SURGICAL, INC., REAL PARTIES IN INTEREST.

No. 56928

SICOR, INC.; TEVA PARENTERAL MEDICINES, INC. (FKA SICOR PHARMACEUTICALS, INC.); MCKESSON MEDICAL-SURGICAL, INC.; AND BAXTER HEALTHCARE CORPORATION, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE, RESPONDENTS, AND MARIA V. PAGAN, INDIVIDUALLY; AND WILLIAM I. BILGER, JR., AND MARILYN ELAINE BILGER, HUSBAND AND WIFE, REAL PARTIES IN INTEREST.

No. 57079

July 28, 2011 262 P.3d 360

Consolidated petitions for writs of mandamus challenging district court rulings regarding the admission of evidence.

Patients at clinic brought product liability actions against drug manufacturers claiming that defective vials of anesthetic caused them to contract hepatitis C. In one case, the district court denied patients' motion in limine to exclude expert testimony, and in a separate case, the district court granted the motions in limine. Patients and manufacturers filed petitions for writs of mandamus. Upon consolidation, the supreme court, HARDESTY, J., held that: (1) nurse did not possess the requisite skill, knowledge, or experience to testify as an expert witness regarding the medical cause of hepatitis C transmission; and (2) defense expert did not need to testify to a reasonable degree of medical probability as long as his opinion about the alternative theory of causation was relevant and supported by competent medical research.

Petitions granted in part and denied in part.

Mainor Eglet and *Robert T. Eglet*, Las Vegas; *Kemp Jones & Coulthard LLP* and *Will Kemp*, Las Vegas, for James M. Williams;

Heidi Williams; Joanne Allen; Kenneth G. Allen; Maria V. Pagan; William I. Bilger, Jr.; and Marilyn Elaine Bilger.

Lewis & Roca LLP and *Daniel F. Polsenberg*, Las Vegas; *Olson, Cannon, Gormley & Desruisseaux* and *James R. Olson, Michael E. Stoberski*, and *Max E. Corrick II*, Las Vegas; *Alan M. Dershowitz*, Cambridge, Massachusetts, for Baxter Healthcare Corporation; McKesson Medical-Surgical, Inc.; Sicor, Inc.; and Teva Parenteral Medicines, Inc.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. MANDAMUS.
   Mandamus is not available when the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law, and the opportunity to appeal a final judgment typically provides an adequate legal remedy.
3. COURTS; MANDAMUS.
   The supreme court may consider petitions for writs of mandamus challenging the admission or exclusion of evidence when an important issue of law needs clarification and public policy is served by the court's invocation of its original jurisdiction or when the issue is one of first impression and of fundamental public importance.
4. MANDAMUS.
   Exception to the supreme court's normal rule of rejecting petitions for writs of mandamus challenging evidentiary rulings was necessary, when petitions involved issues of first impression regarding whether a nurse could offer expert testimony about medical causation and the appropriate standard for defense expert testimony regarding alternative theories of medical causation, the issues had the potential of being repeated in the many endoscopy cases pending before the district court, and waiting for an appeal to resolve the issues did not provide the parties with an adequate or speedy remedy because the ongoing litigation of multiple cases in the district court and conflicts in evidentiary rulings limited the supreme court's ability to meaningfully review the issues on appeal.
5. MANDAMUS.
   The supreme court will generally not consider writ petitions challenging evidentiary rulings, as those rulings are discretionary and there typically is an adequate remedy in the form of an appeal following an adverse final judgment.
6. MANDAMUS.
   In the context of a writ petition, the supreme court gives deference to the district court's findings of fact, but reviews questions of law de novo.
7. MANDAMUS.
   Issues raised in petitions for writs of mandamus regarding district courts' rulings on motions in limine to exclude expert testimony in product liability actions were questions of law.
8. EVIDENCE.
   While nurse might have been more than qualified to testify as to proper cleaning and sterilization procedures for endoscopic equipment and

could testify on those subjects in product liability action, he did not possess the requisite skill, knowledge, or experience to testify as an expert witness regarding the medical cause of hepatitis C transmission at endoscopy clinic; despite his experience with endoscopy equipment and disinfectant techniques, nurse had little, if any, experience in diagnosing the cause of hepatitis C, and, by manufacturer's own admission, nurse was only a leading expert on endoscopic reprocessing, which did not, by extension, qualify him to testify regarding medical causation. NRS 50.275.

9. EVIDENCE.

Nurses are not per se precluded from testifying as to medical causation. NRS 50.275, 632.019.

10. EVIDENCE.

The district court must evaluate an individual nurse's qualifications when deciding whether to admit or exclude expert testimony. NRS 50.275.

11. EVIDENCE.

To assist the trier of fact, medical expert testimony regarding causation must be made to a reasonable degree of medical probability; such specificity is required because if the medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which a jury can make a decision with sufficient certainty so as to make a legal judgment.

12. EVIDENCE.

When defense expert testimony regarding medical causation is offered as an alternative to the plaintiff's theory, it will assist the trier of fact if it is relevant and supported by competent medical research.

13. EVIDENCE.

If defense expert's testimony was introduced in products liability action to contradict the patients' expert's theory as to how they contracted hepatitis C by providing an alternative causation theory, then he did not need to testify to a reasonable degree of medical probability as long as his opinion about the alternative theory was relevant and supported by competent medical research.

14. EVIDENCE.

The relevant inquiry in determining whether the reasonable degree of medical probability standard applies to the admission of expert testimony is the purpose of the testimony; any expert testimony introduced for the purpose of establishing causation must be stated to a reasonable degree of medical probability, but defense experts may offer opinions concerning causation that either contradict the plaintiff's expert or furnish reasonable alternative causes to that offered by the plaintiff.

15. EVIDENCE.

If the defendant proposes an independent alternative medical causation theory to that offered by plaintiff's expert, his or her expert's testimony is subject to the reasonable degree of medical probability standard because, in order to assist the trier of fact, testimony establishing cause must meet a heightened threshold requirement.

16. EVIDENCE.

If the defense expert's testimony is used for the purpose of cross-examining the plaintiff's expert or to otherwise contradict the plaintiff's causation theory by comparing that theory to other plausible causes, the defense expert does not need to state each additional cause to a greater-than-50-percent probability; because the defense expert in this instance is controverting a key element of the plaintiffs prima facie case, as long as his or her alternative causation theory or theories are competent and sup-

ported by relevant evidence or research, they need not be stated as being more likely than not.

17. EVIDENCE.

If the defense expert does not consider the plaintiff's theory of medical causation at all, then the defense expert must state any independent alternative causes to a reasonable degree of medical probability because he or she then bears the burden of establishing the causative fact for the trier of fact; otherwise, the testimony would be incompetent not only because it lacks the degree of probability necessary for admissibility but also because it does nothing to controvert the evidence of plaintiffs.

18. EVIDENCE.

Although there is a lower standard for rebuttal expert testimony regarding medical causation, any alternative causation theories proffered by a defense expert to controvert the plaintiff's theory of cause are still subject to certain threshold requirements, namely that medical experts testifying as to cause must avoid speculation; the defense expert's testimony must also be relevant and supported by competent medical research.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

These consolidated writ petitions raise two novel issues involving the admissibility of expert testimony: (1) whether a nurse can testify as an expert regarding medical causation, and (2) whether defense expert testimony offering alternative causation theories must meet the ''reasonable degree of medical probability'' standard set forth in *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 155, 111 P.3d 1112, 1114 (2005). We conclude that a nurse can testify regarding matters within his or her specialized area of practice, but not as to medical causation unless he or she has obtained the requisite knowledge, skill, experience, or training to identify cause. We further take this opportunity to clarify the standard for defense expert testimony regarding medical causation and conclude that the standard differs depending on how the defendant utilizes the expert's testimony. When a defense expert traverses the causation theory offered by the plaintiff and purports to establish an independent causation theory, the testimony must be stated to a reasonable degree of medical probability pursuant to *Morsicato*. However, when a defense expert's testimony of alternative causation theories controverts an element of the plaintiff's prima facie case where the plaintiff bears the burden of proof, the testimony need not be stated to a reasonable degree of medical proba-

[1]THE HONORABLE KRISTINA PICKERING, Justice, and THE HONORABLE RON PARRAGUIRRE, Justice, voluntarily recused themselves from participation in the decision of this matter.

bility, but it must be relevant and supported by competent medical research.

Here, in Docket No. 56928, we conclude that the district court abused its discretion when it allowed an unqualified nurse to offer expert testimony regarding medical causation; however, it did not abuse its discretion when it determined that one of the defense's other expert witnesses could offer testimony regarding alternative causation theories. In Docket No. 57079, we conclude that the district court abused its discretion when it precluded the same nurse from offering any expert testimony because a nurse can testify within his or her area of expertise but not as to causation, unless he or she possesses the requisite knowledge, skill, experience, or training to identify cause.[2] Therefore, writ relief is granted in part and denied in part.

FACTS

These writ petitions arise out of two separate actions resulting from an outbreak of hepatitis C at the Endoscopy Clinic of Southern Nevada (ECSN) in Las Vegas. The defendants in the district court are companies involved in the pharmaceutical industry that are being sued by former patients who were allegedly infected with hepatitis C while having procedures performed at ECSN and their spouses.

In each case below, the plaintiffs are suing the defendants for strict products liability, including design defect, failure to warn, and breach of implied warranty of fitness for a particular purpose. The plaintiffs[3] theorize that defective vials of the anesthetic Propofol caused them to contract hepatitis C. They claim that defendants Baxter Healthcare Corporation; Sicor, Inc.; Teva Parenteral Medicines, Inc., f.k.a. Sicor Pharmaceuticals, Inc.; and McKesson Medical-Surgical, Inc. (collectively, Sicor), are liable for their distribution of 50mL vials of Propofol to endoscopy clinics because that size vial lends itself to reuse and contamination. More specifically, the plaintiffs allege that medical personnel at ECSN injected needles contaminated with hepatitis into vials of Propofol. The medical personnel then allegedly reused those vials and injected the plaintiffs with the now-contaminated Propofol.

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[2]The district court in Docket No. 57079 did not address the admissibility of Dr. Cohen's testimony regarding causation.

[3]In Docket No. 56928, the plaintiffs in the lower court and petitioners here are James M. and Heidi Williams, and Joanne and Kenneth G. Allen. Heidi and Kenneth are suing in their capacity as spouses of James and Joanne, who underwent procedures at ECSN. We collectively refer to them as the Williams Petitioners. In Docket No. 57079, the plaintiffs in the lower court and the real parties in interest here are Maria Pagan and William I. and Marilyn Elaine Bilger. Marilyn is suing in her capacity as William's spouse. We collectively refer to them as the Pagan Parties.

To rebut these claims, Sicor obtained opinions from several experts, including the two who are at issue in this appeal: David Hambrick, a registered nurse, and Jonathan Cohen, M.D., a professor of medicine. In both cases, these experts opined that improper cleaning and disinfection techniques at the clinic may have caused the plaintiffs to contract hepatitis C, but they could not identify a specific piece of equipment that transmitted the virus. The Williams Petitioners refer to this theory as the ''dirty scopes'' theory. Based on those opinions, the plaintiffs in each case filed motions in limine to exclude Nurse Hambrick's and Dr. Cohen's testimony. However, the district courts hearing these two cases came to different conclusions concerning Nurse Hambrick.

Docket No. 56928

The Williams Petitioners filed two motions in limine to exclude expert testimony. In the first motion, the Williams Petitioners asked the district court to preclude Sicor from offering testimony that ''dirty scopes'' caused their hepatitis C because Dr. Cohen and Nurse Hambrick ''did *not* have an opinion to a reasonable degree of medical probability that a 'dirty scope' was the cause of hepatitis . . . .'' In the second motion, the Williams Petitioners similarly asked the district court to preclude the defendants from offering testimony regarding a ''dirty scope'' alternative theory of causation, and they also argued that nurses cannot give testimony regarding causation. At the hearing on the motions, the Williams Petitioners again argued that Nurse Hambrick could not qualify as an expert.

The district court denied both motions for two reasons. First, the court noted that ''NRS 632.019 does not preclude a nurse from providing expert testimony.''[4] The district court cited *Staccato v. Valley Hospital*, 123 Nev. 526, 531-32 n.13, 170 P.3d 503, 506 n.13 (2007), for the proposition that assessing a nurse as an expert requires an evaluation of his or her skill and knowledge and that this court has determined that nurses can testify against doctors. The district court further found that Nurse Hambrick was well-qualified and met the standard set forth in *Morsicato*, 121 Nev. 153, 111 P.3d 1112, for expert testimony. The district court next determined that Sicor would ''be able to offer competent evidence and expert testimony regarding [its breach of infection control practices] theory of medical causation.''

Docket No. 57079

The Pagan Parties filed a similar motion in limine to exclude testimony regarding a ''dirty scope'' theory. Unlike in the Williams

[4]NRS 632.019 is the statutory definition of ''[r]egistered nurse.''

Petitioners' case, the district court granted the Pagan Parties' motion to exclude Nurse Hambrick from offering his opinion that unsafe cleaning practices caused the plaintiffs to contract hepatitis C. The district court found that Nurse Hambrick's opinion was related to a specific alternative causation theory and, therefore, had to meet the reasonable degree of medical probability standard announced in *Morsicato*. Applying this standard, the district court determined that, based on Nurse Hambrick's deposition testimony, he could not testify to greater than a 10-percent probability that the cleaning processes used caused the plaintiffs' hepatitis, and *Morsicato* requires greater than 50 percent. The district court also found that, pursuant to *Morsicato*, an ''expert can not simultaneously testify as to 2 different medical causation opinions,'' and, here, Nurse Hambrick could not identify a specific piece of equipment as the cause of the plaintiffs' hepatitis C.

After the district courts entered their respective orders regarding Sicor's expert witnesses, the aggrieved parties (the Williams Petitioners in their case and Sicor in the Pagan Parties' matter) petitioned this court for extraordinary writ relief. On October 14 and November 4, 2010, this court granted temporary stay orders in the underlying matters pending the resolution of the writ petitions. The November 4 order also consolidated these two original writ proceedings.

DISCUSSION

When a writ of mandamus is appropriate

[Headnotes 1, 2]

''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.'' *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted); NRS 34.160. This court has held that the decision to admit or exclude expert opinion testimony is discretionary and is not typically subject to review on a petition for a writ of mandamus. *Walton v. District Court*, 94 Nev. 690, 693, 586 P.2d 309, 311 (1978). Mandamus is also not available when the ''petitioner has a plain, speedy, and adequate remedy in the ordinary course of law,'' *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001), and the opportunity to appeal a final judgment typically provides an adequate legal remedy, *see Walton*, 94 Nev. at 693, 586 P.2d at 310.

[Headnote 3]

Despite these limitations, we recognize some narrow exceptions when writ relief is appropriate concerning challenges to decisions that admit or exclude evidence. We acknowledge that the ability to

appeal a final judgment may not always constitute an adequate and speedy remedy that precludes writ relief, depending on the ''underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented.'' *D.R. Horton v. Dist. Ct.*, 123 Nev. 468, 474-75, 168 P.3d 731, 736 (2007). Thus, we may consider writ petitions challenging the admission or exclusion of evidence when '' 'an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction,' '' *Sonia F. v. Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009) (quoting *Mineral County*, 117 Nev. at 243, 20 P.3d at 805), or when the issue is ''one of first impression and of fundamental public importance,'' *County of Clark v. Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998). We may also consider whether resolution of the writ petition will mitigate or resolve related or future litigation. *Id.* Ultimately, however, our analysis turns on the promotion of judicial economy. *Smith v. District Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) (''The interests of judicial economy . . . will remain the primary standard by which this court exercises its discretion.'').

[Headnotes 4, 5]

We conclude that an exception to our normal rule rejecting writ petitions challenging evidentiary rulings is necessary in this matter, and we exercise our discretion to consider these writ petitions. These petitions involve issues of first impression regarding whether a nurse can offer expert testimony about medical causation and the appropriate standard for defense expert testimony regarding alternative theories of medical causation, and these issues have the potential of being repeated in the many endoscopy cases pending before the district court. We also conclude that, in this narrow instance, waiting for an appeal to resolve these issues does not provide the parties with an adequate or speedy remedy because the ongoing litigation of multiple cases in the district court and conflicts in evidentiary rulings limits our ability to meaningfully review the issues on appeal. We reemphasize, however, that generally this court will not consider writ petitions challenging evidentiary rulings, as those rulings are discretionary and there typically is an adequate remedy in the form of an appeal following an adverse final judgment. However, in the interest of judicial economy, it is necessary to resolve the issues presented in these writs.

Standard of review

[Headnotes 6, 7]

In the context of a writ petition, this court gives deference to the district court's findings of fact, but reviews questions of law de novo. *Gonski v. Dist. Ct.*, 126 Nev. 551, 557, 245 P.3d 1164,

1168 (2010). The issues raised in these petitions are questions of law.

Admissibility of Nurse Hambrick's and Dr. Cohen's testimony

An ''expert witness assessment turns on whether the proposed witness's special knowledge, skill, experience, training, or education will assist the jury.'' *Staccato*, 123 Nev. at 531, 170 P.3d at 506; *see also* NRS 50.275 (witnesses who possess the requisite ''knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge''). Before a witness may testify as an expert under NRS 50.275, the district court must first determine his or her qualifications, including whether

> (1) he or she [is] qualified in an area of ''scientific, technical or other specialized knowledge'' (the qualification requirement); (2) his or her specialized knowledge must ''assist the trier of fact to understand the evidence or to determine a fact in issue'' (the assistance requirement); and (3) his or her testimony must be limited ''to matters within the scope of [his or her specialized] knowledge'' (the limited scope requirement).

Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (quoting NRS 50.275). In their petition and accompanying supplement, the Williams Petitioners challenge the qualification requirement and the assistance requirement as to Nurse Hambrick, and the assistance requirement as to Dr. Cohen.

Nurse Hambrick is not qualified to testify as to medical causation

[Headnotes 8, 9]

The Williams Petitioners and the Pagan Parties make two arguments regarding Nurse Hambrick's qualifications to testify as to medical causation. First, they argue that nurses can never testify as to medical causation because NRS 632.019 defines ''[r]egistered nurse'' as ''a person who is licensed to practice professional nursing,'' and NRS 632.018 provides that professional nursing ''does not include acts of medical diagnosis.'' Thus, they argue, nurses are not qualified to render expert opinions regarding causation. They ask us to adopt what they characterize as a ''near universal rule that a *nurse* can not play doctor and give medical causation testimony.'' Second, they challenge whether Nurse Hambrick possesses the requisite skill, knowledge, experience, training, or education to testify to the cause of the hepatitis C transmission that occurred at ECSN. We disagree that nurses are per se precluded from testifying as to medical causation, but we agree that Nurse Hambrick did not meet the requirements to testify as an expert regarding medical causation here.

In *Staccato*, we recognized that ''in accordance with Nevada's statutory scheme governing expert witness testimony, and in furtherance of sound public policy, the proper measure for evaluating whether a witness can testify as an expert is whether that witness possesses the skill, knowledge, or experience necessary to [testify].'' 123 Nev. at 527, 170 P.3d at 504; *see also Hallmark*, 124 Nev. at 499, 189 P.3d at 650 (holding that a witness may testify as an expert if ''he or she is qualified in an area of scientific, technical, or other specialized knowledge''). This court has recognized the following nonexhaustive factors in assessing whether an expert witness is appropriately qualified: ''(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training.'' *Hallmark*, 124 Nev. at 499, 189 P.3d at 650-51 (internal footnotes omitted). However, we have consistently rejected the notion that any rigid guidelines can govern this analysis, and district courts have ''wide discretion, within the parameters of NRS 50.275, to fulfill their gatekeeping duties'' to evaluate the admissibility of expert testimony.[5] *Higgs v. State*, 126 Nev. 1, 17, 222 P.3d 648, 658 (2010); *see also Staccato*, 123 Nev. at 530, 170 P.3d at 505.

[Headnote 10]

In some circumstances, a nurse may obtain the requisite skill, knowledge, or experience to testify as to cause. *See Maloney v. Wake Hospital Systems, Inc.*, 262 S.E.2d 680, 684 (N.C. Ct. App. 1980) (excluding nurse's testimony as to cause was in error because

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[5]We recognize that some jurisdictions have adopted bright-line standards holding that, while nurses are qualified to give opinions related to standard of care, they are not similarly qualified to make medical diagnoses or opine as to medical causation. *See Phillips v. Alamed Co., Inc.*, 588 So. 2d 463, 465 (Ala. 1991) (''[W]e cannot say that the trial judge abused his discretion by requiring the testimony of a physician and, implicitly, holding that a registered nurse was not competent to testify as an expert on the issue of proximate cause.''); *Vaughn v. Miss. Baptist Med. Center*, 20 So. 3d 645, 652 (Miss. 2009) (''[N]ursing experts cannot opine as to medical causation and are unable to establish the necessary element of proximate cause.''); *Kent v. Pioneer Valley Hosp.*, 930 P.2d 904, 907 (Utah Ct. App. 1997) (''Although a nurse may well be trained in the proper location to administer injections, we are not persuaded that a nurse is qualified to opine as to nerve damage caused by an allegedly improper injection.''). Other courts that have not allowed nurses to testify have noted that causation is a legal question separate from the question of the appropriate standard of care, which can be within a nurse's area of expertise. *See Elswick v. Nichols*, 144 F. Supp. 2d 758, 767 (E.D. Ky. 2001); *Colwell v. Holy Family Hosp.*, 15 P.3d 210, 213-14 (Wash. Ct. App. 2001). Still other courts have examined statutory restrictions on the practice of nursing and concluded that those restrictions preclude nurses from testifying as to medical causation. *See Flanagan v. Labe*, 666 A.2d 333, 337-38 (Pa. Super. Ct. 1995) (holding that because a Pennsylvania statute did not permit nurses to make medical diagnoses, they were not qualified to opine as to medical causation). However, we decline to follow these authorities.

''nurses and other physicians' assistants play a much greater role in the actual diagnosis and treatment of human ailments than previously''); *Longuy v. La Societe Francaise De Bienfaisance Mutuelle*, 198 P. 1011, 1014 (Cal. Ct. App. 1921) (''[T]estimony [regarding cause of death] sought to be elicited from the professional nurses who were familiar with the baby's condition became very material and should have been admitted.''). Thus, the relevant inquiry does not end with a reading of a statute defining the practice of professional nursing; rather, it depends upon a case-by-case examination of a nurse's actual skill, knowledge, experience, or training that is gained through practicing his or her profession.[6]

Nurse Hambrick has extensive experience in cleaning and disinfecting the type of equipment used during an endoscopy procedure. He is a registered nurse in Texas, has been certified in gastroenterology for ten years, and he is currently the manager of the gastroenterology lab at the Methodist Dallas Medical Center. He has also been published in a peer-reviewed journal regarding biopsy and tissue acquisition equipment, has written and spoken extensively on the topic of infection control, and has trained over 75 people on proper disinfection techniques. Additionally, he served as director of the national board of directors for the Society of Gastroenterology Nurses and Associates. Nurse Hambrick's educational experience includes a two-year nursing degree, and he was due to complete a bachelor of science in nursing in December 2010. Both the Williams Petitioners and the Pagan Parties argue that these facts do not make Nurse Hambrick qualified to testify as an expert because he does not a have a four-year college degree, and his experience with endoscopy equipment cleaning and disinfectant techniques is insufficient to qualify him to give medical causation opinions. The Williams Petitioners also argue that Nurse Hambrick's lack of knowledge about the hepatitis C virus demonstrates that he is unqualified as a medical expert.

Despite his experience with endoscopy equipment and disinfectant techniques, Nurse Hambrick has little, if any, experience in diagnosing the cause of hepatitis C. Nurse Hambrick never indicated, and Sicor did not contend, that Nurse Hambrick ever made medical diagnoses to assess cause. In fact, Nurse Hambrick noted that in his previous nursing positions, doctors, not nurses, always determined the cause of illnesses indicated on a patient's chart. Also, by Sicor's own admission, Nurse Hambrick is only a leading expert on ''endoscopic reprocessing'' and ''the standards gov-

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[6]Just as a licensed professional may gain experience beyond the scope of his or her license, *see Staccato v. Valley Hospital*, 123 Nev. 526, 530, 170 P.3d 503, 505 (2007), a nurse may similarly acquire skill, knowledge, experience, or training outside the scope of the statutory definition of that occupation. Thus, the district court must evaluate an individual nurse's qualifications when deciding whether to admit or exclude expert testimony.

erning and proper means of disinfecting gastrointestinal endoscopy equipment.'' This does not, by extension, qualify him to testify regarding medical causation. We thus conclude that, while Nurse Hambrick may be more than qualified to testify as to proper cleaning and sterilization procedures for endoscopic equipment and can testify on those subjects, he does not possess the requisite skill, knowledge, or experience to testify as an expert witness regarding the medical cause of hepatitis C transmission at ECSN.[7]

Dr. Cohen will assist the trier of fact

[Headnotes 11-13]

To assist the trier of fact, medical expert testimony regarding causation must be ''made to a reasonable degree of medical probability.'' *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005); *see also Hallmark*, 124 Nev. at 500, 189 P.3d at 651 (''If a person is qualified to testify as an expert under NRS 50.275, the district court must then determine whether his or her expected testimony will assist the trier of fact in understanding the evidence or determining a fact in issue.''). Such specificity is required because '' 'if the . . . medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which a jury can make a decision with sufficient certainty so as to make a legal judgment.' '' *Morsicato*, 121 Nev. at 158, 111 P.3d at 1116 (quoting *McMahon v. Young*, 276 A.2d 534, 535 (Pa. 1971)). The Williams Petitioners, the Pagan Parties, and Sicor disagree on the meaning of ''reasonable degree of medical probability'' when that term is used in the context of defense experts who offer alternative causation theories to controvert the plaintiff's prima facie case. Therefore, we clarify the standard and conclude that when defense expert testimony regarding cause is offered as an alternative to the plaintiff's theory, it will assist the trier of fact if it is relevant and supported by competent medical research.

[Headnote 14]

Sicor argues that, in light of the plaintiff's burden of proving causation in a products liability action, *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191, 209 P.3d 271, 275 (2009), the reasonable degree of medical probability standard applies only to the plaintiff's expert's testimony regarding cause. However, the standard exists to ensure the competence and quality of testimony establishing causation, and whether it applies is not determined by the party who offers it. *Stinson v. England*, 633 N.E.2d 532, 537 (Ohio 1994) (''Inasmuch as the expression of probability is a condition

[7]Because we conclude that Nurse Hambrick is not qualified to offer testimony regarding medical causation, we do not analyze the assistance requirement as it pertains to him.

precedent to the admissibility of expert opinion regarding causation, it relates to the competence of such evidence and not its weight. Accordingly, it is essential to focus on the quality of the evidence adduced regardless of the identity of its proponent.''). Rather, the relevant inquiry in determining whether the reasonable degree of medical probability standard applies is the purpose of the testimony. Any expert testimony introduced for the purpose of establishing causation must be stated to a reasonable degree of medical probability. However, defense experts may offer opinions concerning causation that either contradict the plaintiff's expert or furnish reasonable alternative causes to that offered by the plaintiff.

[Headnote 15]

Once the plaintiff has demonstrated a prima facie case and met his or her burden, the defendant can traverse the plaintiff's case in three ways. *See id.* The defendant may (1) cross-examine the plaintiff's expert, (2) contradict the expert's testimony with his own expert, and/or (3) propose an independent alternative causation theory. *Id.* If the defendant chooses the third approach, his or her expert's testimony is subject to the reasonable degree of medical probability standard because, in order to assist the trier of fact, testimony establishing cause must meet a heightened threshold requirement. *Id.* at 538; *see also Goudreault v. Kleeman*, 965 A.2d 1040, 1058 (N.H. 2009) (holding that a lowered standard only applies when the defense expert is rebutting the plaintiff's causation theory). In instances where the expert is expressing an opinion as to causation, it is irrelevant whether the testimony is offered by the plaintiff or the defendant.

[Headnotes 16, 17]

However, if the defense expert's testimony is used for the purpose of cross-examining the plaintiff's expert or to otherwise contradict the plaintiff's causation theory by comparing that theory to other plausible causes, the defense expert does not need to state each additional cause to a greater-than-50-percent probability.[8] *Stinson*, 633 N.E.2d at 538. Because the defense expert in this instance is controverting a key element of the plaintiff's prima facie case, as long as his or her alternative causation theory or theories are competent and supported by relevant evidence or research, they

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[8]By definition, probability requires more than 50-percent likelihood. *Stinson v. England*, 633 N.E.2d 532, 536 (Ohio 1994) (''[P]robability means more than a fifty percent likelihood.''); *see also Morsicato*, 121 Nev. at 159, 111 P.3d at 1116 (reversing the district court because a defense expert could not state that an alternative theory of causation was ''more likely than not'' the cause of the plaintiff's injuries); *Black's Law Dictionary* 1201 (6th ed. 1990) (defining probability as ''[a] condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it'').

need not be stated as being more likely than not. This lowered standard is necessarily predicated on whether the defense expert includes the plaintiff's causation theory in his or her analysis. If the defense expert does not consider the plaintiff's theory of causation at all, then the defense expert must state any independent alternative causes to a reasonable degree of medical probability because he or she then bears the burden of establishing the causative fact for the trier of fact. Otherwise, the testimony would be ''incompetent not only because it lacks the degree of probability necessary for admissibility but also because it does nothing to controvert the evidence of appellants.'' *Stinson*, 633 N.E.2d at 538.

In *Wilder v. Eberhart*, 977 F.2d 673, 676-77 (1st Cir. 1992), the First Circuit Court of Appeals considered a similar issue in a medical malpractice action. The court held that requiring a defense expert to identify a specific cause to a medical probability standard when rebutting the plaintiff's prima facie case would improperly shift the burden to the defendant. *Id.* Thus, the court concluded, defense experts may offer several alternative causes to rebut the plaintiff's theory of cause with less than 50-percent certainty. *Id.* at 677.

We agree with the *Wilder* court's holding, and it logically comports with our conclusion that when a defense expert's testimony is used to contradict a plaintiff's causation theory by comparing that theory to other plausible causes, each additional cause does not need to be stated to a greater-than-50-percent probability. To hold otherwise would severely hinder a defendant's ability to undermine the causation element of the plaintiff's case and could result in an unfair shifting of the burden of proof to the defendant. As illustrated by the *Wilder* court,

> if ninety-nine out of one hundred medical experts agreed that there were four equally possible causes of a certain injury, A, B, C and D, and plaintiff produces the one expert who conclusively states that A was the certain cause of his injury, defendant would be precluded from presenting the testimony of any of the other ninety-nine experts, unless they would testify conclusively that B, C, or D was the cause of injury. Even if all of defendant's experts were prepared to testify that any of the possible causes A, B, C or D, could have equally caused plaintiff's injury, so long as none would be prepared to state that one particular cause, other than that professed by plaintiff more probably than not caused plaintiff's injury, then defendant's experts would not be able to testify at all as to causation. We think that such a result . . . would be manifestly unjust and unduly burdensome on defendants.

977 F.2d at 677. Further, the *Morsicato* standard is not meant to preclude a defendant from undermining the plaintiff's prima facie

case with relevant, medically competent expert testimony on alternative causation theories so long as the defense expert's testimony is being used to controvert the plaintiff's theory.

[Headnote 18]

Although we recognize a lower standard for rebuttal expert testimony regarding medical causation, any alternative causation theories proffered by a defense expert to controvert the plaintiff's theory of cause are still subject to certain threshold requirements, namely that medical experts testifying as to cause must avoid speculation. *See Morsicato*, 121 Nev. at 157-58, 111 P.3d at 1115; *see also Stinson*, 633 N.E.2d at 538 (''[A]n expert for the defense is precluded from engaging in speculation or conjecture with respect to possible causes.''). The defense expert's testimony must also be relevant and supported by competent medical research. *See Higgs v. State*, 126 Nev. 1, 18, 222 P.3d 648, 659 (2010) (''[T]he qualification, assistance, and limited scope requirements . . . ensure reliability and relevance.''). Therefore, if Dr. Cohen's testimony in Docket No. 56928 is introduced to contradict the Williams Petitioners' and the Pagan Parties' theory as to how they contracted hepatitis C by providing an alternative causation theory, then he does not need to testify to a reasonable degree of medical probability as long as his opinion about the alternative theory is relevant and supported by competent medical research. If his testimony meets these standards, it is admissible and will assist the trier of fact.

Accordingly, for the reasons set forth above, we grant in part and deny in part the Williams Petitioners' petition for extraordinary writ relief and direct the clerk of this court to issue a writ of mandamus in Docket No. 56928 instructing the district court to set aside that portion of its order allowing Nurse Hambrick to testify as to medical causation. We further grant in part and deny in part Sicor's petition for extraordinary writ relief and direct the clerk of this court to issue a writ of mandamus in Docket No. 57079 instructing the district court to set aside that portion of its order excluding Nurse Hambrick from testifying as an expert witness on the subjects of proper cleaning and sterilization procedures for endoscopic equipment. Nurse Hambrick may testify within his area of expertise; however, because we conclude he does not possess the requisite qualifications, he may not testify as to medical causation.[9]

DOUGLAS, C.J., and CHERRY, SAITTA, and GIBBONS, JJ., concur.

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[9]We vacate the stays of these cases issued on October 14 and November 4, 2010.

CITY OF OAKLAND, APPELLANT, *v.*
DESERT OUTDOOR ADVERTISING, INC., RESPONDENT.

No. 53973

August 4, 2011 267 P.3d 48

Appeal from a district court order granting a motion for NRCP 60(b) relief from a domesticated foreign judgment. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

City brought action against business to enforce money judgment under sister state's unlawful business practices statute based on business's violations of City's billboard code. The district court granted business's motion to set aside the judgment and quash execution. City appealed. The supreme court, CHERRY, J., held that judgment was penal in nature and thus unenforceable under Full Faith and Credit Clause and Uniform Enforcement of Foreign Judgments Act.

Affirmed.

PICKERING, J., with whom DOUGLAS, C.J., and HARDESTY, J., agreed, dissented.

Porter Simon, PC, and *Brian C. Hanley* and *Peter H. Cuttitta*, Reno, for Appellant.

Robison Belaustegui Sharp & Low and *Frank C. Gilmore*, Reno, for Respondent.

1. JUDGMENT.
   Under the Full Faith and Credit Clause of the United States Constitution, a final judgment entered in a sister state must be respected by the courts of the forum state. U.S. CONST. art. 4, § 1.
2. JUDGMENT.
   Defenses such as lack of personal or subject matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, satisfaction, or other grounds that make the judgment invalid or unenforceable may be raised by a party seeking to reopen or vacate a foreign judgment. U.S. CONST. art. 4, § 1.
3. JUDGMENT.
   The Full Faith and Credit Clause does not apply to penal judgments. U.S. CONST. art. 4, § 1.
4. COURTS.
   Dictum is not controlling.
5. COURTS.
   A statement in a case is dictum when it is unnecessary to a determination of the questions involved.
6. JUDGMENT.
   Civil monetary judgment in favor of City against business under sister state's unlawful business practices statute based on violations of City billboard code was penal in nature, and thus was unenforceable in forum

state under Full Faith and Credit Clause and Uniform Enforcement of Foreign Judgments Act; private party could not have sued business under statute, statute provided that violators of billboard code were guilty of misdemeanors for violating billboard code, and statute's intent to deter conduct deemed wrongful under sister state's law addressed only public wrongs rather than private harms. U.S. CONST. art. 4, § 1; NRS 17.330-17.400.

7. JUDGMENT.

Central question in determining whether judgment based on a statutory violation is penal, and thus not subject to enforcement under Full Faith and Credit Clause, is whether the statute provided civil penalties as a means to punish a violator for an offense against the public or whether the statute created a private right of action to compensate a private person or entity. U.S. CONST. art. 4, § 1.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

This appeal involves an attempt by appellant City of Oakland to enforce, in Nevada, a California civil judgment against respondent Desert Outdoor Advertising, Inc. We consider whether the California judgment is entitled to full faith and credit in Nevada. Recognizing that *Huntington v. Attrill*, 146 U.S. 657 (1892), provides an exemption to the Full Faith and Credit Clause of the United States Constitution, such that other states' penal judgments are unenforceable in the state of Nevada, we conclude that the California judgment in this case was penal in nature and, as such, is not enforceable in Nevada. Accordingly, we affirm the district court's decision in this matter.

FACTUAL AND PROCEDURAL HISTORY

In 2003, Desert Outdoor erected an outdoor billboard for advertising purposes within Oakland, California, city limits. Upon learning of the advertisement, Oakland sent a notice to abate to Desert Outdoor, advising it that the billboard was in violation of Oakland's municipal code. Specifically, the sign in question contained advertisements for businesses that were not located on the property on which the sign was erected, in violation of Oakland Municipal Code section 14.04.270.[1] After two months had passed and Desert Outdoor had taken no action, Oakland sent Desert Outdoor another notice to abate, advising Desert Outdoor that it was in violation of Oakland Municipal Code sections 14.04.270,

[1]Oakland Municipal Code section 14.04.270 provides, among other things, that any billboard on a property that is adjacent to a freeway must relate to a business that is located on that property.

17.10.850,[2] and 17.70.050(B).[3] The second notice to abate also instructed Desert Outdoor to remove the billboard and its supporting pole within the next month.

After Desert Outdoor failed to remove the sign, Oakland filed suit against it in California for, among other things, unlawful business practices, with the consent of the Alameda County District Attorney. *See* Cal. Bus. & Prof. Code § 5466(b) (providing for civil actions brought by government entities). The California district court ultimately found that Desert Outdoor engaged in unlawful business practices through its violation of the aforementioned Oakland Municipal Code sections. Thus, the California district court imposed civil statutory penalties upon Desert Outdoor. On November 2, 2007, the California district court entered a civil judgment in favor of Oakland pursuant to California Business and Professions Code Section 5485.[4] The judgment was for

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[2]Oakland Municipal Code section 17.10.850 defines advertising signs, in relevant part, as ''[a] sign directing attention to, or otherwise pertaining to, a commodity, service, business, or profession which is not sold, produced, conducted, or offered by any activity on the same lot.''

[3]Oakland Municipal Code section 17.70.050(B) provides that special, development, realty, civic, and business signs are to be permitted.

[4]California Business and Professions Code section 5485 provides, in relevant part, that

> (b) If a display is placed or maintained without a valid, unrevoked, and unexpired permit, the following penalties shall be assessed:
>
> (1) If the advertising display is placed or maintained in a location that conforms to the provisions of this chapter, a penalty of one hundred dollars ($100) shall be assessed.
>
> (2) If the advertising display is placed or maintained in a location that does not conform to the provisions of this chapter or local ordinances, and is not removed within thirty days of written notice from the department or the city or the county with land use jurisdiction over the property upon which the advertising display is located, a penalty of ten thousand dollars ($10,000) plus one hundred dollars ($100) for each day the advertising display is placed or maintained after the department sends written notice shall be assessed.
>
> (c) In addition to the penalties set forth in subdivision (b), the gross revenues from the unauthorized advertising display that are received by, or owed to, the applicant and a person working in concert with the applicant shall be disgorged.
>
> (d) The department or a city or a county within the location upon which the advertising is located may enforce the provisions of this section.
>
> (e) Notwithstanding any other provision of law, if an action results in the successful enforcement of this section, the department may request the court to award the department its enforcement costs, including, but not limited to, its reasonable attorneys' fees for pursuing the action.
>
> (f) It is the intent of the Legislature in enacting this section to strengthen the ability of local governments to *enforce* zoning ordinances governing advertising displays.

(Emphasis added.)

(1) $124,000 in statutory civil penalties, which were calculated by adding the statutory penalty of $10,000, plus $75 per day for 1,520 days of violation; (2) $263,000 in disgorged profits; and (3) costs and attorney fees in the amount of $92,353.75. Desert Outdoor appealed the judgment, and the California Court of Appeal affirmed.

On February 28, 2008, Oakland filed its California judgment in Nevada's Second Judicial District Court, seeking enforcement of the judgment under the Uniform Enforcement of Foreign Judgments Act (UEFJA). NRS 17.330-.400. Thereafter, Oakland attached Desert Outdoor's bank accounts and income from Desert Outdoor's Nevada properties. Approximately 13 months after the judgment was filed in Nevada, Desert Outdoor filed a motion to set aside the foreign judgment and quash execution of the judgment. The district court granted Desert Outdoor's motion, concluding that because California's judgment was penal, it was not entitled to full faith and credit. This appeal followed.

DISCUSSION

On appeal, Oakland argues that the district court: (1) improperly relied on the United States Supreme Court's decision in *Huntington v. Attrill*, 146 U.S. 657 (1892), to conclude that the penal judgment of a sister state need not be given full faith and credit by Nevada courts; and (2) erred in concluding that the California civil monetary judgment was penal in nature. We disagree with Oakland's contentions, and we affirm the district court's decision.

The California judgment falls within the penal exception to the Full Faith and Credit Clause set forth in Huntington v. Attrill

On appeal, Oakland argues that the district court erred when it relied upon *Huntington v. Attrill*, 146 U.S. 657 (1892), to set aside the California judgment. Oakland contends that *Huntington* is a ''relic'' of ''questionable authority,'' and that its enforcement is contrary to the purpose of the UEFJA, codified in Nevada at NRS 17.330 through 17.400, which is to ''provide a speedy and economical method to enforce foreign judgments and to make uniform the laws of the states that enact it.'' As a result, Oakland argues, citing *Rosenstein v. Steele*, 103 Nev. 571, 573, 747 P.2d 230, 232 (1987), that the district court erred in setting aside the judgment because the only defenses available to Desert Outdoor under the UEFJA are those that a ''judgment debtor may constitutionally raise under the Full Faith and Credit Clause and which are directed to the validity of the foreign judgment.'' For the reasons set forth below, we reject Oakland's contentions and conclude that the penal

exception set forth in *Huntington* warrants against enforcement of the California judgment in Nevada.

The Full Faith and Credit Clause and the UEFJA

[Headnote 1]

Under the Full Faith and Credit Clause of the United States Constitution, a final judgment entered in a sister state must be respected by the courts of this state. *See* U.S. Const. art. IV, § 1; *Rosenstein*, 103 Nev. at 573, 747 P.2d at 231; *Donlan v. State*, 127 Nev. 143, 145 & n.1, 249 P.3d 1231, 1233 & n.1 (2011). ''For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity.'' *Broderick v. Rosner*, 294 U.S. 629, 643 (1935).

To further the principle of comity, Nevada adopted the UEFJA in NRS 17.330 through 17.400. Under this act, a properly filed foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a Nevada district court judgment, and may be enforced or satisfied in like manner. NRS 17.350. Nevada's UEFJA applies to all foreign judgments filed in Nevada district court for the purpose of enforcing the judgment in Nevada. NRS 17.340; NRS 17.350. The act defines a foreign judgment ''as any judgment of a court of the United States or of any other court *which is entitled to full faith and credit in this state*.'' NRS 17.340 (emphasis added).

[Headnotes 2, 3]

However, not all judgments are entitled to full faith and credit in Nevada. Notably, ''defenses such as lack of personal or subject-matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, satisfaction, or other grounds that make the judgment invalid or unenforceable may be raised by a party seeking to reopen or vacate a foreign judgment.'' 30 Am. Jur. 2d *Executions and Enforcement of Judgments* § 787 (2005); *see also Rosenstein*, 103 Nev. at 573, 747 P.2d at 232; *Marworth, Inc. v. McGuire*, 810 P.2d 653, 656 (Colo. 1991); *Wooster v. Wooster*, 399 N.W.2d 330, 333 (S.D. 1987) (quoting *Baldwin v. Heinold Commodities Inc.*, 363 N.W.2d 191, 194 (S.D. 1985)). In addition, the United States Supreme Court has determined that the Full Faith and Credit Clause does not apply to penal judgments. *Huntington v. Attrill*, 146 U.S. 657, 666, 672-73 (1892); *Nelson v. George*, 399 U.S. 224, 229 (1970) (reiterating that ''the full faith and credit clause does not require that sister states enforce a for-

eign penal judgment''). This exception for penal judgments, most notably analyzed in *Huntington*, is the law at issue here.

Huntington v. Attrill

In *Huntington*, Huntington obtained a judgment against Attrill in New York based on a statutory provision imposing joint and several liability on the officers of a corporation for the debts of the corporation itself if the officer made any materially false representation in a certificate, report, or public notice. *Id.* at 660-62. Huntington then brought a bill in Maryland state court seeking to have the New York judgment enforced in Maryland. *Id.* at 660-61. Attrill demurred to the bill on the grounds that Huntington's claim ''was for recovery of a penalty against Attrill arising under a statute of the state of New York, and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the State of Maryland.'' *Id.* at 663. The circuit court of Baltimore overruled the demurrer, and the Maryland Court of Appeals reversed the decision of the circuit court and dismissed the bill on the grounds that ''liability imposed by section 21 of the statute of New York . . . was intended as a punishment for doing any of the forbidden acts, and was, therefore, . . . a penalty which could not be enforced in the state of Maryland.'' *Id.*

Huntington then sought a writ of error in the United States Supreme Court, arguing that the Maryland court unconstitutionally denied full faith and credit to the New York judgment. *Id.* at 665. After determining that the question of whether full faith and credit was denied to the New York judgment in Maryland was a federal question, the *Huntington* Court stated that ''in order to determine this question, it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law stated by Chief Justice Marshall in the fewest possible words: 'The courts of no country execute the penal laws of another.' '' *Id.* at 666 (citing *The Antelope*, 23 U.S. 66, 123 (1825)). The *Huntington* court then determined that

> [t]he question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.

Id. at 673-74.

[Headnotes 4, 5]

In analyzing whether the penal exception applies in this case, we must first resolve whether the penal analysis and exception

in *Huntington* is dictum. Dictum is not controlling. *Argentena Consol. Mining Co. v. Jolley Urga*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009); *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 282, 21 P.3d 16, 22 (2001). ''A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.' '' *Argentena Consol.*, 125 Nev. at 536, 216 P.3d at 785 (quoting *St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009)).

We conclude that the statement in *Huntington* regarding the penal exception does not constitute dictum because it was necessary to determine the questions involved. While it has been indicated that this analysis is dictum, we disagree. *See* Note, *Enforcement by One State of Penal Statutes of Another*, 26 Harv. L. Rev. 172 n.1 (1912) (stating that the penal exception discussion in *Huntington* was ''*dictum*, since the case only decided that a judgment on such a statute must be given full faith and credit under the constitution''); *Kersting v. Hardgrove*, 48 A.2d 309, 310 (N.J. Cir. Ct. 1946) (stating that ''courts of one sovereignty will not enforce the penal laws of a foreign sovereignty'' is ''oft repeated dictum'' that goes back to *Huntington* and ''the maxim of international law that '[t]he courts of no country execute the penal laws of another' '' (quoting *The Antelope*, 23 U.S. 66, 123 (1825))).

As stated by the United States District Court in the Eastern District of Virginia, ''the only issue before the Court in *Huntington* was the meaning of the terms 'penal' and 'penalty' in the context of the international law doctrine that penal laws of one jurisdiction will not be enforced in a foreign jurisdiction.'' *Fisher v. Virginia Electric and Power Co.*, 243 F. Supp. 2d 538, 543 (E.D. Va. 2003).[5] The *Huntington* Court clearly stated that ''[i]n order to determine this question [of whether full faith and credit was denied], it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law . . . : 'The courts of no country execute the penal laws of another.' '' *Huntington*, 146 U.S. at 666 (quoting *The Antelope*, 23 U.S. at 123). The *Huntington* Court later concluded its decision on the fact that the ''statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law in the international sense.'' *Id.* at 686.

After *Huntington* was decided, the United States Supreme Court impliedly questioned the penal exception in *Milwaukee County v. White Co.*, 296 U.S. 268, 279 (1935), when it ''intimate[d] no

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[5]The dissent misconstrues the court's statements in *Fisher* in an attempt to bolster its position. When *Fisher* discusses ''the *Huntington* fallacy,'' it is not disparaging the penal exception, as the dissent suggests, but is referring to *Huntington*'s discussion of the local action doctrine, a real property trespass doctrine that is inapplicable in this case. *Fisher*, 243 F. Supp. 2d at 543-44.

opinion whether a suit upon a judgment for an obligation created by a penal law, in the international sense, . . . is within the jurisdiction of the federal district courts'' (citation omitted). However, the Court then reiterated that ''the Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment'' for a second time in *Nelson v. George*, 399 U.S. 224, 229 (1970) (citing *Huntington*, 146 U.S. 657). The Court noted that ''until the obligation to extradite matures, the Full Faith and Credit Clause does not require California to enforce the North Carolina penal judgment in any way.'' *Id.* at 229 n.6; *see also Philadelphia v. Austin*, 429 A.2d 568, 572 (N.J. 1981) (stating that ''the United States Supreme Court has continued to recognize the vitality of the penal exception'' (citing *Nelson*, 399 U.S. at 229)).[6] Furthermore, numerous courts have recognized the viability of *Huntington*'s penal exception. *See, e.g.*, *Schaefer v. H. B. Green Transportation Line*, 232 F.2d 415, 418 (7th Cir. 1956) (''It is generally recognized that penalties fixed by state laws are not [enforceable] in federal courts or even in other State courts.''); *People v. Laino*, 87 P.3d 27, 34 (Cal. 2004) (recognizing *Huntington*'s penal exception and determining that ''[i]f California need not give full faith and credit to penal judgments of another state, then it is free to determine under its own laws whether defendant's Arizona plea constitutes a conviction for purposes of the three strikes law''); *Wellman v. Mead*, 107 A. 396, 398-400 (Vt. 1919) (recognizing that *Huntington*'s penal exception applies to criminal laws and to penalties arising from municipal laws and concluding that the law at issue was not penal). Accordingly, we conclude that the *Huntington* penal analysis is not dictum.

Oakland further asserts that *Huntington* was effectively superseded by the passage of time and UEFJA, as recognized by *Rosenstein*, 103 Nev. at 573, 747 P.2d at 232. Oakland contends that according to *Rosenstein*, the only defenses to the UEFJA are not applicable here because the defenses are limited to those ''that a

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[6]The dissent points out that in *Austin*, the court enforced a sister state judgment but fails to explain that the holding in *Austin* was limited to a penalty for failure to pay taxes that the court recognized was not intended to punish but was ''a civil remedy to the City in its role as tax collector.'' 429 A.2d at 571. In concluding that the Full Faith and Credit Clause requires enforcement of a sister state tax judgment, the court determined that

> it is not necessary to reject outright the penal exception to the Full Faith and Credit Clause. Indeed, that conclusion would be inappropriate since the United States Supreme Court has continued to recognize the vitality of the penal exception. *Nelson v. George*, 399 U.S. 224, 229 (1970). In this decision, we distinguish between a purely penal law and a tax law with penal provisions.

Id. at 572. The court then left ''the question of enforcement of an extrastate civil judgment containing penalties for violation of laws other than tax laws, such as parking ordinances,'' unresolved. *Id.*

judgment debtor can constitutionally raise under the full faith and credit clause and which are directed to the validity of the foreign judgment.'' *Id*.

We reject Oakland's argument because we conclude that *Huntington*'s penal exception is an exception to the Full Faith and Credit Clause as it removes the judgment from the scope of the clause altogether. Because the California judgment is not one entitled to full faith and credit, it does not fall under Nevada's UEFJA. *See* NRS 17.340 (stating, in relevant part, that ''unless the context otherwise requires, 'foreign judgment' means any judgment of a court of the United States or of any other court which is *entitled to full faith and credit* in this state'' (emphasis added)); *see also Farmers & Merchants Trust Company v. Madeira*, 68 Cal. Rptr. 184, 188 (Ct. App. 1968) (''If the judgment is a penal judgment it is not enforceable in this state under either the full faith and credit clause of the United States Constitution or as a matter of comity.''); *S.H. v. Adm'r of Golden Valley Health Ctr.*, 386 N.W.2d 805, 807 (Minn. Ct. App. 1986) (while not deciding the merits of the case, recognizing that ''[t]he full faith and credit clause . . . does not require a state to enforce the penal judgment of another state''); *MGM Desert Inn, Inc. v. Holz*, 411 S.E.2d 399, 402 (N.C. Ct. App. 1991) (''One exception to the full faith and credit rule is a penal judgment; a state need not enforce the penal judgment of another state.'' (quoting *FMS Management Systems v. Thomas*, 309 S.E.2d 697, 699-700 (N.C. Ct. App. 1983))); *Russo v. Dear*, 105 S.W.3d 43, 46 (Tex. App. 2003) (recognizing that penal judgments are not entitled to full faith and credit as they are among the recognized exceptions to the full faith and credit requirements). Thus, not all judgments are entitled to full faith and credit under Nevada's UEFJA, as recognized by *Rosenstein*, and these exceptions include the applicable penal exception in this case.[7]

Based on the foregoing discussion, we conclude that the *Huntington* penal exception to the Full Faith and Credit Clause is valid and binding law. Because we conclude that penal laws are exempted from the requirements of full faith and credit in Nevada, we next turn to the determination of whether the California judgment in this case was penal in nature.[8]

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[7]While we have not discussed *Huntington* in the past, we disagree with Oakland that this somehow renders the *Huntington* doctrine not viable in Nevada. *Huntington*'s penal exception has been repeatedly cited to over the years, has never been overruled by the United States Supreme Court, and has been enforced in other cases. *See, e.g.*, *Russo*, 105 S.W.3d at 46; *Holz*, 411 S.E.2d at 402; *S.H.*, 386 N.W.2d at 807.

[8]The dissent begins its argument that the California judgment should be enforced in Nevada by pointing out that gambling debts are entitled to enforcement in sister states that prohibit gambling and prohibit the enforcement of

The California civil monetary judgment

[Headnote 6]

Oakland contends that the civil judgment is remedial and not penal because it resulted from Oakland's enforcement of its individual rights under California's unfair competition laws and was brought to halt a private harm against Oakland. We disagree and conclude that pursuant to the language used in California Business and Professions Code section 5485, the assessed statutory civil penalties were penal in nature.

Under the *Huntington* test,

> [t]he question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.

146 U.S. at 673-74. ''The test is not by what name the statute is called by the legislature . . . , but whether it appears . . . to be in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.'' *Id*. at 683.

[Headnote 7]

Thus, here, the central question is whether the statute provided civil penalties as a means to punish a violator for an offense against the public or whether the statute created a private right of action to compensate a private person or entity.

We conclude that Oakland was not a private entity enforcing a civil right. Instead, pursuant to California Business and Professions Code section 17206, Oakland filed suit, with the permission of the Alameda County District Attorney, seeking penalties for Desert Outdoor's violations of Oakland zoning ordinances. Under these circumstances, it does not appear that private parties could have sued Desert Outdoor pursuant to California Business and Professions Code section 5466. However, each principal, agent, or employee of Desert Outdoor is also guilty of a misdemeanor for violating the billboard code sections. Cal. Bus. & Prof. Code § 5464. Moreover, California Business and Professions Code section 5485(f) makes plain that the legislature's intent in mandating such

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gambling debts. However, the dissent fails to consider that it is illegal to cause a casino marker to be issued when the individual has insufficient funds to pay back the marker. *See* NRS 205.0832; NRS 205.130. It is not illegal to erect and maintain billboards in violation of zoning codes. Accordingly, these two situations are not analogous.

penalties was ''to strengthen the ability of local governments to enforce zoning ordinances governing advertising displays.'' As such, it is clear that the statutes' remedies do not address private harms but rather address only public wrongs—in this case, the abatement of a public nuisance—and were intended to deter conduct deemed wrongful under California law. While Oakland contends that it suffered damages, we conclude that the purpose of the statute and resulting judgment was not to ''afford a private remedy to a person injured by the wrongful act,'' but its essential character and effect was ''to punish an offense against the public justice of the state,'' as evidenced by Oakland implementing suit. *Huntington*, 146 U.S. at 673-74.[9]

Accordingly, we conclude that this penal judgment cannot be enforced in Nevada pursuant to *Huntington*, and we affirm the judgment of the district court.[10]

SAITTA, GIBBONS, and PARRAGUIRRE, JJ., concur.

PICKERING, J., with whom DOUGLAS, C.J., and HARDESTY, J., agree, dissenting:

A Nevada judgment on a gambling debt is entitled to enforcement in a sister state, even though the sister state has statutes that outlaw gambling and prohibit judicial enforcement of gambling debts. *MGM Desert Inn, Inc. v. Holz*, 411 S.E.2d 399, 401-03 (N.C. Ct. App. 1991) (citing the Full Faith and Credit Clause analysis in *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1902), and the Uniform Enforcement of Foreign Judgments Act). I would extend the same reciprocal courtesy to the California judgment presented here. True, the California judgment, while civil, embodies a fine imposed to coerce compliance with an Oakland outdoor advertising ordinance, after warnings and lesser remedies failed. But the issue is not whether Nevada must allow Oakland to sue on its ordinance originally in a Nevada court. We have here a California judgment, fully enforceable under its laws for enforcing civil judgments, presented to our Nevada courts for enforcement against a Nevada defendant that departed California for Nevada after suffering judgment there. This California judgment is as enforceable under the Full Faith and Credit Clause of the United States Con-

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[9]Our conclusion that the judgment is unenforceable renders moot the question of whether the doctrine of equitable estoppel bars Desert Outdoor's attempt to set aside the domesticated judgment under NRCP 60(b)(4). Accordingly, we will not discuss this contention further.

[10]We have carefully considered Oakland's contention that the question of whether Nevada will enforce a penal judgment is still permissive in nature and that the judgment here should be enforced based on public policy grounds, and we conclude that this contention is unpersuasive.

stitution[1] and the Uniform Enforcement of Foreign Judgments Act, NRS 17.330-.400, as the gambling debt judgment in *MGM Desert Inn*. For these reasons, and as a matter of comity, I respectfully dissent.

The majority takes *Huntington v. Attrill*, 146 U.S. 657 (1892), as gospel. But *Huntington*'s holding, as distinct from its dictum, is that a Maryland court violated the Full Faith and Credit Clause and erred in not enforcing a New York judgment based on a New York statute that made a corporation's directors who violated the state's corporation laws automatically liable for the entity's debts. In so ruling, the Supreme Court rejected the defendant's argument that the underlying claim was based on ''a penal law, in the international sense,'' *id*. at 673, and thus did not deserve full faith and credit. The ''international sense'' of the New York judgment and law figured in *Huntington*, at least in part, because the record showed a Canadian tribunal had enforced the same New York judgment that Maryland had declined to enforce. *Id*. at 680-81 (noting that a ''Committee of the Privy Council of England, upon an appeal from Canada, in an action brought by the present plaintiff [Huntington] against Attrill in the province of Ontario upon the judgment to enforce which the present suit was brought'' had deemed the New York judgment enforceable in Canada). The New York judgment received more full faith and credit in Canada, in other words, than it did in Maryland, an anomaly *Huntington* rectified.

Huntington does contain language, cited by the majority, suggesting that the Full Faith and Credit Clause permits a state court to refuse to enforce a sister state penal judgment on the same terms as it might deny effect to a foreign-country penal judgment, and, drawing on international law, *Huntington* deems ''penal'' a judgment based on a law whose ''purpose is to punish an offense against the public justice of the State.'' *Id*. at 673-74. However, unlike the majority, I view this language as dictum, perhaps necessary to frame the arguments presented but not necessary to the actual holding in *Huntington*. *See* Note, *Enforcement by One State of Penal Statutes of Another*, 26 Harv. L. Rev. 172 n.1 (1912) (the penal exception discussion in *Huntington* is ''*dictum*, since the case only decided that a judgment on such a statute must be given full faith and credit under the constitution''); *Kersting v. Hardgrove*, 48 A.2d 309, 310 (N.J. Cir. Ct. 1946) (stating that ''courts of one sovereignty will not enforce the penal laws of a foreign sovereignty'' is ''oft repeated dictum'' that goes back to *Huntington* and

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[1]The Full Faith and Credit Clause of the United States Constitution provides that ''Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.'' U.S. Const. art. IV, § 1.

''the maxim of international law that '[t]he courts of no country execute the penal laws of another' '' (quoting *The Antelope*, 23 U.S. 66, 123 (1825))). And in a later decision, the Court cited *Huntington* but reserved (or revived) the question whether a sister state judgment for a monetary penalty is entitled to full faith and credit: ''We intimate no opinion whether[, in] a suit upon a judgment for an obligation created by a penal law, in the international sense, . . . full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.'' *Milwaukee County v. White Co.*, 296 U.S. 268, 279 (1935).

Milwaukee County suggests considerable uncertainty as to the scope and/or viability of *Huntington*'s so-called penal exception, as applied to a sister state money judgment, even where, as here, that judgment runs in favor of a local governmental entity. Certainly, *Huntington* does not compel the holding that a state *must*, under the Full Faith and Credit Clause, refuse to enforce a sister state's money judgment because that judgment may be based on a law that is ''penal . . . in the international sense.'' Commentators, too, recognize that *Huntington* is sketchy authority, at best, on this point. As noted in the Restatement (Second) of Conflict of Laws section 120, comment d (1971): ''The Supreme Court of the United States has never squarely decided whether a State may look through the valid money judgment of a sister State and refuse to enforce the judgment on the ground that it was based on a penal cause of action.'' It goes on to say that ''[t]he privilege of refusing to enforce the sister State judgment, *if it exists at all*, is a narrow one.'' *Id*. (emphasis added); *see also* Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193, 202 (1932) (''Essentially civil claims should never be denied extrastate enforcement merely because the epithet penal can be attached to them.'').

The law distinguishes between suits to enforce claims arising under another state's laws and suits on final judgments rendered by a sister state. States may not be obligated to entertain suits based on sister state tax laws or laws that deeply offend local public policy. *Milwaukee County*, 296 U.S. at 274-75; *Nevada v. Hall*, 440 U.S. 410, 421-22 (1979). Once the claim has been reduced to judgment, however, the Full Faith and Credit Clause makes the judgment portable from state to state and requires interstate enforcement of the civil judgment that results. *Milwaukee County*, 296 U.S. at 275-76; *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943) (while ''there may be exceptional cases in which the judgment of one state may not override the laws and policy of another, . . . [w]e are aware of no such exception in the case of a money judgment rendered in a civil suit [or] of any considerations of local policy or law which could rightly be deemed to impair the

force and effect which the full faith and credit clause and the Act of Congress require to be given to such a judgment outside the state of its rendition'').

The case law the majority cites to show the vitality of the rule it takes from *Huntington* offers little true support. In one case, *Wellman v. Mead*, 107 A. 396, 398 (Vt. 1919), the Vermont Supreme Court discussed the penal exception only to decide whether Vermont courts would entertain a suit arising under Massachusetts law. The majority's reliance on this case confuses the distinction—drawn in *Milwaukee County* and discussed above—between suits to adjudicate *claims* arising under another state's laws and suits to enforce final *judgments* rendered by a sister state. *Milwaukee County*, 296 U.S. at 275-76. Another case, *Fisher v. Virginia Electric and Power Co.*, 243 F. Supp. 2d 538, 543-44 (E.D. Va. 2003), is dictum about dictum. *Fisher* cites *Huntington* only to inform a discussion on which law—state or federal—determines whether an action is local or transitory in nature (and disparages ''the *Huntington* fallacy'' as ''broad discourse'' involving a ''rather obvious misapprehension'' of law modernly rejected as ''dictum'').

In a third case, *Schaefer v. H. B. Green Transportation Line*, 232 F.2d 415, 418 (7th Cir. 1956), the Seventh Circuit Court of Appeals discussed the penal exception in the context of whether an Illinois law *applied* extraterritorially, not whether an Illinois judgment would be *enforced* extraterritorially. In that case, the plaintiff brought suit in the federal district court of Illinois seeking to enforce an Illinois corporate statute against an Iowa corporation for corporate conduct that occurred in Iowa. *Id.* at 417. The court held that the statute could not be applied. *Id.* at 418. But it is one thing to deny extraterritorial application of a state's statute, and quite another to deny enforcement of a sister state judgment embodying a civil fine imposed for erecting and maintaining billboards in the sister state's airspace and against its zoning laws. Indeed, the majority's fourth case, *Philadelphia v. Austin*, 429 A.2d 568, 572 (N.J. 1981), makes this point—and does so in the context of a local governmental entity's suit on a sister state money judgment for a fine. Thus, in *Austin*, the New Jersey Supreme Court enforced a Pennsylvania judgment in favor of the City of Philadelphia for a penalty incurred for not complying with a Philadelphia wage tax ordinance, doing so both as a matter of full faith and credit under *Milwaukee County*, *id.* at 571, and as a matter of comity. *Id.* at 572-73.[2]

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[2]*Nelson v. George*, 399 U.S. 224, 229 (1970), and *People v. Laino*, 87 P.3d 27, 33-34 (Cal. 2004), cited by the majority, involve instances where the penal exception actually applies, *i.e.*, in assessing a sister state criminal conviction and its consequences under the host state's criminal laws. *See Nelson*, 399

Differences between the Uniform Enforcement of Foreign Judgments Act and the Uniform Foreign-Country Money Judgments Act, both of which have been adopted in Nevada, provide statutory support for recognizing the California judgment in this case. In *Overmyer v. Eliot Realty*, 371 N.Y.S.2d 246, 256 (Sup. Ct. 1975), a New York court observed that the Uniform Enforcement of Foreign Judgments Act, which governs enforcement of sister state judgments, does not have a penal exception, *id.* at 256, while its Uniform Recognition of Foreign-Country Money Judgments Act, which governs enforcement of international judgments, contains an exception to recognition when the foreign country judgment is for ''penalties or taxes.'' *Id.* From this, the *Overmyer* court concluded that, as a matter of comity, a sister state civil judgment embodying a fine or penalty will be enforced, whereas a comparable foreign country judgment will not.

Our statutes contain the same differences as those in *Overmyer*. Nevada's version of the Uniform Recognition of Foreign-Country Money Judgments Act includes a section on applicability, and provides that a foreign-country judgment for a sum of money need not be enforced if it is for a fine or other penalty. NRS 17.740(2)(b); *see* Unif. Foreign Money-Judgments Recognition Act § 1(2), 13 U.L.A. 44 (2002); Unif. Foreign-Country Money Judgments Recognition Act § 3(b)(2), 13 U.L.A. 12 (Supp. 2010). On the other hand, our Uniform Enforcement of Foreign Judgments Act, which outlines procedures for enforcement of sister state judgments, lacks an applicability provision, much less a penal exception. *See* NRS 17.330-.400. It requires only that the sister state judgment be filed with the clerk of court. NRS 17.350. ''A judgment so filed has the same effect . . . as a judgment of a district court of this state and may be enforced or satisfied in a like manner'' and is to be treated ''in the same manner as a judgment of the district court of this state.'' NRS 17.350.

For these reasons, I would enforce the City of Oakland's judgment, even though it may embody a fine. Such a judgment might not be internationally enforceable, but it should be enforceable when rendered by a sister state.

U.S. at 229 n.6 (discussing the penal exception in connection with a habeas petition challenging a North Carolina criminal conviction/detainer claimed to affect a California parole determination); *Laino*, 87 P.3d at 37-38 (discussing the effect of an Arizona judgment of conviction on California's three-strikes law). Of note, even in this context, Nevada can—though it is not constitutionally required to—recognize and attach consequences to a sister state criminal conviction. *See Donlan v. State*, 127 Nev. 143, 249 P.3d 1231 (2011) (California judgment of conviction required sex offender to register in Nevada, even though the registration requirement had expired in California, where the conviction originated).

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, APPELLANT, *v.* COREGIS INSURANCE COMPANY, NKA WESTPORT INSURANCE CORPORATION, RESPONDENT.

54502

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, APPELLANT, v. COREGIS INSURANCE COMPANY, NKA WESTPORT INSURANCE CORPORATION, RESPONDENT.

No. 56638

August 4, 2011 256 P.3d 958

Consolidated appeals from a district court summary judgment in an insurance action and from a post-judgment order denying an NRCP 60(b) motion. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Insured, which was a city police department, filed declaratory judgment against excess liability insurer, seeking a determination that insurer was required to defend and indemnify it for damages related to civil rights claims that had been filed against it. The district court entered summary judgment for insurer, and, thereafter, denied insured's motion for relief from judgment. Insured appealed. The supreme court, GIBBONS, J., held that: (1) genuine fact issues precluded summary judgment to insurer; and (2) when insurer denies coverage of claim because insured failed to provide timely notice of claim, insurer must demonstrate that notice was late and that it was prejudiced by the late notice in order to assert a late-notice defense to coverage.

Reversed and remanded.

Santoro, Driggs, Walch, Kearney, Holley & Thompson and *James E. Whitmire, III*, and *Donna M. Wittig*, Las Vegas, for Appellant.

Lewis Brisbois Bisgaard & Smith, LLP, and *Josh C. Aicklen*, Las Vegas; *Banovetz, Tressler, Soderstrom, Maloney & Priess, LLC*, and *Mark Banovetz*, Chicago, Illinois, for Respondent.

1. APPEAL AND ERROR.

   The supreme court would not address, on plaintiff's appeal of summary judgment to defendant, the issues of whether the district court erred in denying its motion for relief from judgment or in denying its motion to supplement the record, where plaintiff failed to provide any argument or citation to authority on these issues. NRAP 28(a)(8)(A); NRCP 60(b).

2. JUDGMENT.

   Genuine issues of material fact existed as to whether insured's notice to excess liability insurer of claim arising out of civil rights suit filed

against insured was timely, thus precluding summary judgment to insurer in declaratory judgment action filed by insured seeking determination that insurer was required to defend and indemnify insured for damages related to civil rights suit.

3. APPEAL AND ERROR.
   The interpretation of an insurance policy presents a legal question, which the supreme court reviews de novo.
4. APPEAL AND ERROR.
   The supreme court reviews summary judgment de novo.
5. JUDGMENT.
   A court may grant summary judgment if the evidence does not create a genuine issue of material fact.
6. JUDGMENT.
   In considering a motion for summary judgment, the court must view the evidence and any reasonable inferences in the light most favorable to the nonmoving party.
7. JUDGMENT.
   When requesting summary judgment, the moving party bears the initial burden of production to demonstrate the absence of a genuine issue of material fact, and if the moving party meets its burden, then the nonmoving party bears the burden of production to demonstrate that there is a genuine issue of material fact.
8. INSURANCE.
   Excess liability insurer did not waive its late-notice defense to insured's claim for coverage, as insurer asserted it at the same time as it denied the claim on other grounds by including its late-notice defense in its first denial letter, along with the other grounds for denial of claim.
9. INSURANCE.
   When an insurance policy explicitly makes compliance with a term in the policy a condition precedent to coverage, the insured has the burden of establishing that it complied with that term.
10. INSURANCE.
    The language ''as soon as practicable'' in notice requirement of liability policy does not mean immediate; instead, it calls for notice within a reasonable length of time under all facts and circumstances of each particular case.
11. INSURANCE.
    An insured party's status as a sophisticated party does not overcome the purpose behind construing unclear insurance provisions against the insurer without evidence that the insured party was actually involved in drafting the policy provision in question or participated in negotiations involving that policy provision.
12. INSURANCE.
    Immediate notice of an insurance claim is not required in the excess insurance context.
13. INSURANCE.
    For an insurer to deny coverage of a claim based on the insured party's late notice of that claim, the insurer must show (1) that the notice was late and (2) that it has been prejudiced by the late notice; prejudice, which is an issue of fact, exists when the delay materially impairs an insurer's ability to contest its liability to an insured or the liability of the insured to a third party.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

These appeals raise important issues about insurance claim notice provisions and whether an insurer may properly deny coverage to an insured based on late notice of a claim in the absence of prejudice to the insurer. Because we conclude that prejudice must be shown, we also address the issue of who has the burden to demonstrate prejudice or lack of prejudice and place that burden on the insurer. Before reaching those issues, however, we first address whether summary judgment was appropriately entered in favor of the insurer, when the parties dispute whether the notice was timely, given the language of the insurance policy and the facts present here.

Appellant Las Vegas Metropolitan Police Department (LVMPD) was named as a defendant in a federal district court action alleging civil rights violations. LVMPD had an insurance policy with respondent Coregis Insurance Company to protect against liability for police officer actions when the damages exceeded a certain amount. Coregis denied LVMPD coverage for the civil rights claims because LVMPD did not notify Coregis of LVMPD's potential liability until ten years after the incident that led to the civil rights lawsuit. LVMPD settled the civil rights action, incurring fees and costs in defending the case. LVMPD then filed a declaratory-judgment action seeking a judicial determination that Coregis was required to defend and indemnify LVMPD for damages related to the civil rights claims. On Coregis's motion, the district court entered summary judgment in favor of Coregis, concluding that LVMPD's notice was clearly late and that Coregis was prejudiced by the late notice.

Viewing the evidence in a light most favorable to LVMPD, we conclude that there were genuine issues of material fact regarding the timeliness of LVMPD's notice, such that summary judgment was not appropriate here. With regard to the issues concerning denial of coverage based on failure to comply with notice requirements, after considering the parties' arguments and persuasive caselaw, we conclude that when an insurer denies coverage of a claim because the insured party failed to provide timely notice of the claim, the insurer must demonstrate that notice was late and that it was prejudiced by the late notice in order to assert a late-notice defense to coverage. Accordingly, we reverse the summary judgment and remand this case for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

The civil rights action against LVMPD was filed by the Estate of Erin DeLew on grounds that LVMPD acted to cover up evidence

in the Estate's 1994 wrongful death action against an LVMPD officer's wife, Janet Wagner. According to the wrongful death action, on September 27, 1994, DeLew was riding her bicycle when Wagner struck DeLew with her automobile, causing injuries to DeLew that ultimately led to her death.

In 1996, the DeLew Estate filed a separate civil rights cause of action, under 42 U.S.C. § 1983, against LVMPD and the Nevada Highway Patrol (NHP), arguing that the two organizations conspired and covered up the true cause of the accident, which affected the Estate's ability to prosecute its wrongful death action against Wagner. NHP removed the civil rights case to the United States District Court and that court dismissed the action. The Ninth Circuit Court of Appeals reversed the dismissal, concluding that the Estate had a possible claim under 42 U.S.C. § 1983, but that the claim was premature because the wrongful death cause of action had not been resolved. After the Estate settled the wrongful death claim with Wagner, it filed a second civil rights action against LVMPD and NHP on January 28, 2000, which was essentially identical to the 1996 lawsuit. In 2002, the U.S. District Court granted LVMPD and NHP summary judgment, but three years later, on November 15, 2005, it vacated LVMPD's summary judgment as a discovery sanction. LVMPD had failed to provide the majority of the documents that the DeLew Estate had requested by the discovery deadline and had failed to comply with the discovery sanction order requiring it to provide those documents.

In 1994, when the Estate filed its wrongful death action against Wagner, LVMPD was self-insured up to $1 million dollars in damages for liability related to police officer actions. Thus, it had no primary insurer and would cover each occurrence up to $1 million dollars itself. Through Coregis, LVMPD was insured for up to $10 million dollars if police officer actions resulting in personal injuries, including violations of civil rights, exceeded LVMPD's $1 million self-insured retention amount.[1] The insurance policy contained four different sections: (1) a general liability section, (2) an automobile liability section, (3) a public entity errors and omissions section, and (4) a law enforcement liability section. Three of the sections contained the same notice requirement, which mandated that LVMPD notify Coregis of a claim when a claimant's demand totaled 50 percent or more of the self-insured retention amount. The fourth section, the law enforcement liability section, required LVMPD to provide Coregis notice of an occurrence that may result in a claim as soon as practicable and to immediately

[1]Technically, the named insured on the Coregis policy is Clark County, Nevada, and the responsible insurer is Westport Insurance Corporation. For ease of reference, we will refer to the insured as LVMPD and the insurer as Coregis.

provide Coregis copies of any demands or other legal documents. The law enforcement liability section covers liability for bodily injury or property damage caused by a member of LVMPD acting in his or her law enforcement capacity. That section stated that LVMPD was ''solely responsible for the investigation, settlement, defense and final disposition of any claim made . . . against [LVMPD] to which [the law enforcement liability section] would apply.'' The section further stated that LVMPD is financially responsible for such defense, that LVMPD shall act diligently in defending claims, and that LVMPD shall agree to a reasonable offer within their self-insured retention amount. The law enforcement liability section also provided that LVMPD did not have a right to coverage ''unless all of [this section's] terms have been fully complied with.''

In August 2006, the DeLew Estate made its first settlement demand against LVMPD in the civil rights action, seeking $4.5 million. LVMPD notified Coregis of the DeLew Estate's civil rights lawsuit on November 6, 2006. Coregis sent LVMPD a letter acknowledging notice of the DeLew Estate lawsuit, reserving all rights concerning any coverage issues, and denying coverage because LVMPD failed to provide timely notice of the DeLew Estate lawsuit. Despite the denial of coverage, LVMPD requested Coregis to reconsider and attend the settlement conferences between LVMPD and the DeLew Estate, but Coregis declined to participate in the settlement process. LVMPD settled with the DeLew Estate in March 2007 for $1.475 million. LVMPD allegedly incurred $803,136.58 in fees and costs in defending the lawsuit.

[Headnote 1]

Following the settlement, LVMPD filed a declaratory-judgment action seeking a judicial determination that Coregis was required to defend and indemnify LVMPD in the civil rights action under the Coregis policy. Coregis filed a motion for summary judgment, which the district court granted, finding that LVMPD failed to provide timely notice of the claims against it, such that coverage was properly denied, and finding that while Coregis did not need to show that it was prejudiced by the late notice, it was able to do so because of the discovery sanction overturning LVMPD's summary judgment in the civil rights cause of action. LVMPD now appeals.[2]

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[2]Because LVMPD failed to provide any argument or citation to authority on the issues of whether the district court erred in denying its post-judgment motion under NRCP 60(b) and whether the district court erred in denying its post-judgment motion to supplement the record, we will not address these issues. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); NRAP 28(a)(8)(A).

DISCUSSION

I. *Standard of review*

[Headnotes 2-7]

The interpretation of an insurance policy presents a legal question, which we review de novo. *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). We also review summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A court may grant summary judgment if the evidence does not create a genuine issue of material fact. *Id.* In considering a motion for summary judgment, the court must view the evidence and any reasonable inferences in the light most favorable to the nonmoving party. *Id.* When requesting summary judgment, the moving party bears the initial burden of production to demonstrate the absence of a genuine issue of material fact. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). If the moving party meets its burden, then the nonmoving party bears the burden of production to demonstrate that there is a genuine issue of material fact. *Id.*

II. *An issue of fact remains regarding whether the notice was timely*

[Headnote 8]

LVMPD contends that the district court erred in granting Coregis summary judgment because genuine issues of material fact remained concerning whether LVMPD timely tendered its insurance claim to Coregis.[3] We agree.

[Headnote 9]

When an insurance policy explicitly makes compliance with a term in the policy a condition precedent to coverage, the insured has the burden of establishing that it complied with that term. *Insurance Co. v. Cassinelli*, 67 Nev. 227, 244-45, 216 P.2d 606, 615 (1950); *Lucini-Parish Ins. v. Buck*, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

Under the facts present here, the district court erred in concluding that notice was late as a matter of law. The civil rights ac-

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[3]LVMPD also argues that the district court erred in concluding that Coregis did not waive its late-notice claim defense. We disagree. By including its late-notice defense in its first denial letter, along with the other grounds for the denial, Coregis did not waive its late-notice defense because it asserted it at the same time it denied the claim on other grounds. *See Havas v. Atlantic Insurance Co.*, 96 Nev. 586, 588, 614 P.2d 1, 2 (1980); 46 C.J.S. *Insurance* § 1190 (2007). Further, although LVMPD contends that a Coregis insurance adjuster orally agreed to waive the late-notice defense, the policy provides that ''[t]he terms of this policy can be amended or waived only by endorsement issued by [Coregis] and made a part of the policy.''

tion was originally dismissed in 1997 and lay dormant until it was refiled in 2000. Then, LVMPD was granted summary judgment on the civil rights action in 2002, and the case lay dormant again until 2005. Notice during the years of dormancy would have been futile. Further, LVMPD sent notice to Coregis on November 6, 2006, after it had received its first settlement demand that was in excess of its self-insured retention amount. Coregis refused to participate in the settlement negotiations, and LVMPD did not settle until March 2007.

[Headnotes 10, 11]

When considering these facts and the conflicting notice provisions within the insurance policy in the light most favorable to LVMPD, summary judgment was inappropriate here. Three sections of the 75-page insurance policy contained notice provisions requiring LVMPD to provide Coregis with notice of a claim once a demand was made in excess of $500,000. LVMPD relied on these notice sections. When Coregis originally denied LVMPD's claim, it cited to the law enforcement liability section, which required notice as soon as practicable,[4] and it cited to the public entity's errors and omissions section, which required notice after a demand of at least $500,000. Therefore, it was not unreasonable for LVMPD to believe that it did not need to provide notice to Coregis until a demand was made in excess of $500,000.[5]

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[4]Even considering the facts in accordance with only the law enforcement liability section, the district court could not conclude that notice was late as a matter of law. First, the law enforcement liability section states that LVMPD must notify Coregis of an occurrence that may result in a claim *as soon as practicable*. Second, it states that LVMPD must *immediately* send Coregis copies of any documents filed in connection with the claim. Lastly, it states that LVMPD is ''solely responsible for the investigation, settlement, defense and final disposition of any claim.'' Requiring LVMPD to immediately send copies of documents filed in connection with the defense of the claim creates the implication that Coregis would want to be involved in defending the claim, which is inconsistent with the requirement that LVMPD solely defend and settle the claim. Additionally, the language ''as soon as practicable'' does not mean immediate; instead, it '' 'call[s] for notice within a reasonable length of time under all facts and circumstances of each particular case.' '' *American Fidelity Fire Ins. v. Adams*, 97 Nev. 106, 108, 625 P.2d 88, 89 (1981) (quoting *Certified Indemnity Company v. Thun*, 439 P.2d 28, 30 (Colo. 1968)).

[5]Coregis contends that LVMPD was a sophisticated party to the insurance policy, and thus, it cannot argue that it was confused by the policy. We disagree. Even if LVMPD is a sophisticated party, considering the evidence in the light most favorable to LVMPD, summary judgment was inappropriate. *See National Union Fire Ins. v. Reno's Exec. Air*, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (1984). An insured party's status as a sophisticated party does not overcome the purpose behind construing unclear insurance provisions against the insurer without evidence that the insured party was actually involved in drafting the policy provision in question or participated in negotiations involving that policy provision. *See Pittston Co. Ultramar America v. Allianz Ins.*, 124 F.3d 508, 521 (3d Cir. 1997).

[Headnote 12]

LVMPD's belief that it did not have to provide Coregis notice until the $500,000 self-insured retention amount was exceeded is supported by the notion that immediate notice of an insurance claim is not required in the excess insurance context.[6] *See Lumbermens Mut. v. Plantation Pipeline*, 447 S.E.2d 89, 90-91 (Ga. Ct. App. 1994) (concluding that a 15-year delay was reasonable because the insured did not think it was likely that the damages would exceed the ceiling of its primary policy until then); *Morris Park Contr. Corp. v. National Union Fire*, 822 N.Y.S.2d 616, 619 (App. Div. 2006) (concluding that the issue of notice looks at whether the insured reasonably believed that its primary insurance was going to cover the damages up until it gave notice to its excess insurer). Excess insurers are generally only concerned with occurrences that may involve their policies. Accordingly, summary judgment was inappropriate here because the determination of whether notice was late is a much more fact-intensive inquiry when an excess insurance policy is involved than it is when a primary insurance policy is involved, and there were still genuine issues of material fact present concerning whether LVMPD's notice was timely under any of the notice provisions.

III. *When an insurer asserts a late-notice defense, it must show that notice was late and that it was prejudiced by the late notice*

LVMPD urges adoption of a notice-prejudice rule, which requires that in order for an insurer to deny a claim based on late notice, it must have been prejudiced by the late notice. We do so here and place the burden to show prejudice on the insurer. It is more practical and equitable to require the insurer to prove it has been prejudiced than it would be to place that burden on the insured party and require him or her to prove a negative, namely, that the insured had not been prejudiced.

In *Insurance Co. v. Cassinelli*, 67 Nev. 227, 216 P.2d 606 (1950), we considered whether the insured party's recovery was precluded because he provided late notice of the claim to his insurer. *Id.* at 232, 216 P.2d at 609. Cassinelli was a passenger in a car that was owned and being driven by his adult son when their car collided with Mabel Miller's car, injuring Miller. *Id.* Miller

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[6]Coregis argues that because LVMPD did not have traditional primary insurance as it was self-insured, Coregis was LVMPD's primary insurer, not an excess insurer. However, the Coregis policy specifically states that it is an excess insurance policy to any other insurance available to LVMPD, except for insurance purchased to cover excess damages not covered by LVMPD's self-insured retention. The policy's title includes the word ''excess,'' as does each section's title.

sued both Cassinelli and his son, serving Cassinelli on September 19, 1946. *Id.* at 233, 216 P.2d at 609. Cassinelli did not provide notice to his insurer until January 16, 1947, and the trial was set for February 20, 1947. *Id.* Cassinelli claimed that he failed to notify his insurer earlier because he thought his insurance had lapsed and that he was then insured by a different insurer. *Id.* The insurance policy provided that

> [u]pon the occurrence of an accident written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. . . . If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

Id. at 232-33, 216 P.2d at 609. The policy further stated that the insured cannot file an action against ''the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy.'' *Id.* at 233, 216 P.2d at 609.

The *Cassinelli* court surveyed other jurisdictions' consideration of this issue and determined that the majority rule at the time was that if an insurance policy explicitly required timely notice and the insured party failed to provide timely notice, the insured party was precluded from bringing a claim against the insurer, whether or not the insurer was actually prejudiced by the late notice. *Id.* at 236-44, 216 P.2d 611-15. In coming to its conclusion, this court stated:

> We may say frankly that upon our first reading of the briefs prior to argument and at the conclusion of the argument, we were strongly impressed with the cases presented to the effect that right of recovery under the policy would not be barred by failure to give timely notice, unless the insurer had been prejudiced by such failure. The arguments in favor of such rule seemed plausible and the rule itself appeared neither unfair nor inequitable. . . . It would be presumptuous on our part to establish a rule of law in this state which departs from the overwhelming majority of decisions throughout the United States.

Id. at 245, 216 P.2d at 615. Thus, this court adopted the majority rule at the time and rejected a rule that would require insurers to demonstrate prejudice in the event they receive late notice. As a result, this court concluded that because a four-month delay in providing notice of a lawsuit failed to comply with the policy's provision that notice be provided immediately, the claim was precluded. *Id.* at 245-46, 216 P.2d at 615.

We acknowledge that *Cassinelli* has since been abrogated by NAC 686A.660(4) and abrogated *sub silentio* by *Las Vegas Star Taxi, Inc. v. St. Paul Insurance*, 102 Nev. 11, 714 P.2d 562

(1986). In 1980, the Nevada Department of Commerce, Division of Insurance, adopted NAC 686A.660(4), which states:

> No insurer may, except where there is a time limit specified in the insurance contract or policy, require a claimant to give written notice of loss or proof of loss within a specified time or seek to relieve the insurer of the obligations if the requirement is not complied with, *unless the failure to comply prejudices the insurer's rights*.[7]

(Emphasis added.)

Following the enactment of NAC 686A.660, we considered *Star Taxi*, in which an injured party sued a taxi company and the taxi company failed to provide notice of the claim to its insurance company until ten days before the trial date even though the policy explicitly required prompt notice. 102 Nev. at 12-13, 714 P.2d at 563. The taxi company settled the claim without first discussing the settlement with its insurance company, and when the insurance company denied coverage, the taxi company sued, seeking to recover under the policy. *Id.* at 11-12, 714 P.2d at 562. The district court entered summary judgment in favor of the insurer, and the taxi company appealed. *Id.* On appeal, without referencing *Cassinelli* or NAC 686A.660(4), this court first considered the issue of notice and then, in passing, addressed the issue of prejudice, thus implicitly abrogating *Cassinelli*. *Id.* at 13-14, 714 P.2d at 564.

The majority of jurisdictions since 1950 have adopted a notice-prejudice rule. *See* Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* 197-267 (15th ed. 2011 Supp.); 16 Richard A. Lord *Williston on Contracts* § 49:109 (4th ed. 2000); 13 *Couch on Insurance 3D* § 193:25 (2005). Further, the majority of jurisdictions that require a showing of prejudice place that burden on the insurer. *See* Ostrager & Newman, *supra*, at 205; *Williston on Contracts*, *supra*, § 49:109. Jurisdictions that place the burden to show prejudice on the insurer recognize the difficulty the insured party would face in trying to prove that the insurer was not prejudiced and recognize that the insurer is in the better position to prove that it was prejudiced by the late notice. *See Campbell v. Allstate Insurance Company*, 384 P.2d 155, 157 (Cal. 1963) (''Although it may be difficult for an insurer to prove prejudice in some situations, it ordinarily would be at least as difficult for the injured person to prove a lack of prejudice, which involves the proof of a negative.''); *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 803 (Ky. 1991) (''[T]he insur-

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[7]Coregis argues that NAC 686A.660 does not overrule *Cassinelli* because NAC 686A.660 does not apply to third-party claims. We are not persuaded by Coregis's argument because NAC 686A.660(4), which is at issue here, applies to all claimants.

ance carrier is in a far superior position to be knowledgeable about the facts which establish whether prejudice exists. . . . [I]t is difficult to imagine where the claimant would look for evidence that no prejudice exists.'').

Additionally, because insurance policies are generally adhesion contracts, equity principles support placing the burden to prove prejudice on the insurer because it is trying to deny its obligations under a contract of adhesion. *See State Farm Mutual Automobile Ins. Co. v. Johnson*, 320 A.2d 345, 347 (Del. 1974); *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193, 198 (Pa. 1977). Because the notice provision in an insurance policy is meant to protect the insurer '' 'from being placed in a substantially less favorable position than it would have been in had timely notice been provided . . . [meaning] the function of a notice requirement is to protect the insurance company's interests from being prejudiced,' '' it is equitable and practicable to place the burden on the insurer to demonstrate that prejudice resulted from the insured giving late notice. *Co-Op. Fire Ins. v. White Caps, Inc.*, 694 A.2d 34, 38-39 (Vt. 1997) (quoting *Brakeman*, 371 A.2d at 197).

[Headnote 13]

In accordance with the majority of jurisdictions and with the express language of NAC 686A.660(4), we adopt a notice-prejudice rule: in order for an insurer to deny coverage of a claim based on the insured party's late notice of that claim, the insurer must show (1) that the notice was late and (2) that it has been prejudiced by the late notice. Prejudice exists ''where the delay materially impairs an insurer's ability to contest its liability to an insured or the liability of the insured to a third party.'' *West Bay Exploration v. AIG Specialty Agencies*, 915 F.2d 1030, 1036-37 (6th Cir. 1990) (internal quotation omitted). The issue of prejudice is an issue of fact. *See Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 191 P.3d 866, 876 (Wash. 2008).

CONCLUSION

In conclusion, we reverse the district court's summary judgment and adopt a notice-prejudice rule. First, the district court erred in granting Coregis summary judgment when there were still genuine issues of material fact as to whether notice was late. Second, when an insurer denies coverage of a claim because notice of the claim was late, the insurer must show (1) that notice was late and (2) that it was prejudiced by the late notice. Accordingly, we reverse the judgment of the district court and remand this matter for proceedings consistent with this opinion.

DOUGLAS, C.J., and CHERRY, SAITTA, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

BEN ROETHLISBERGER, APPELLANT, *v.*
ANDREA MCNULTY, RESPONDENT.

No. 54774

August 4, 2011 256 P.3d 955

Appeal from a district court order denying a motion for a change of venue in a tort action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Plaintiff filed a complaint alleging tort claims against nonresident defendant and others. Nonresident defendant filed a demand and a motion to change venue. The remaining defendants either joined in this motion or filed their own similar motion. The district court denied the motions to change venue, and nonresident defendant appealed. The supreme court, GIBBONS, J., held that: (1) because venue in Washoe County was not improper as to nonresident defendant, he lacked standing to request a change of venue in tort action based on a codefendant's residence; and (2) the district court did not abuse its discretion in denying nonresident defendant's motion to transfer venue due to convenience of witnesses and ends of justice.

Affirmed.

Echeverria Law Office and *John P. Echeverria*, Reno; *Morgan, Lewis & Bockius LLP* and *Franklin Brockway Gowdy* and *Rollin B. Chippey, II*, San Francisco, California, for Appellant.

Dunlap & Laxalt and *Calvin R.X. Dunlap* and *Monique Laxalt*, Reno, for Respondent.

1. ACTION.
   Standing is the legal right to set judicial machinery in motion.
2. APPEAL AND ERROR.
   Because standing concerns a question of law, the supreme court conducts de novo review.
3. VENUE.
   Because venue in Washoe County was not improper as to nonresident defendant, he lacked standing to request a change of venue in tort action based on a codefendant's residence. NRS 13.040.
4. VENUE.
   Venue based on one's residence is a privilege personal to each defendant.
5. VENUE.
   When venue is proper as to one defendant, that defendant may not argue that venue is improper based on a codefendant's residence.
6. VENUE.
   When a defendant requests a change of venue, the district court must consider if that defendant has the right to assert that venue is improper and, thus, to request the change of venue.

7. APPEAL AND ERROR.
   The supreme court reviews a district court's ruling on a motion to change venue due to the convenience of the witnesses and the ends of justice for abuse of discretion. NRS 13.050(2)(c).
8. VENUE.
   The district court did not abuse its discretion in denying nonresident defendant's motion to transfer venue in tort case pursuant to statute giving the district court wide discretion to grant motion to change venue when convenience of witnesses and ends of justice would be promoted by the change; there was no indication that convenience of witnesses compelled change in venue or that holding trial in Douglas County, rather than in Washoe County, would promote interests of justice, the difference in travel times to the courts in either county were, for many witnesses, relatively minimal, and while defendant might receive speedier trial in Douglas County, it was not abuse of discretion for the court to conclude that ends of justice were adequately served by keeping venue in Washoe County and would not be furthered by change of venue. NRS 13.050(2)(c).

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

Appellant moved for a change of venue pursuant to NRS 13.040, based on residence, and NRS 13.050, based on convenience. When his motion was denied, he filed this appeal, arguing that none of the defendants reside in the county where the action is to be tried and that because the alleged events occurred in a different county, venue should be transferred there for reasons of convenience and justice. We conclude, however, that as venue was not improper as to appellant, he lacked standing to challenge venue based on his codefendant's place of residence. Also, as to the discretionary venue provision concerning convenience and the ends of justice, we conclude that the district court did not abuse its wide discretion in refusing to change the place of trial. Accordingly, we affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

Respondent Andrea McNulty filed a complaint in the Second Judicial District Court, located in Washoe County, alleging tort claims against appellant Ben Roethlisberger and eight other defendants. The events on which the allegations were based occurred in Douglas County, but Roethlisberger is a resident of Pennsylvania.

Only one of the defendants, Dave Monroe, was alleged to be a resident of Washoe County, where the complaint was filed. Monroe owns a house in Washoe County and a house in Douglas County. Monroe spends approximately five days a week at the

Douglas County home because it is closer to his work. Monroe's wife and children primarily live in the Washoe County home, with some holidays spent at the Douglas County home. Monroe is registered to vote in Washoe County and has registered numerous vehicles to his Washoe County address, which is also the address listed on his driver's license. Finally, Monroe's wife received service of process of the summons and complaint on his behalf at the Washoe County house.

In the Washoe County court, Roethlisberger filed a demand and a motion to change venue to Douglas County. In his motion, he argued, in part, that venue was improper in Washoe County because no defendant resided there. Roethlisberger asserted that while Monroe owned a house in Washoe County, he actually resided in Douglas County. Monroe also filed a motion to change venue. The remaining defendants either joined in Roethlisberger's motion or filed their own similar motion.

The district court denied the motions to change venue. Only Roethlisberger and Monroe appealed, and the district court stayed all proceedings pending the resolution of the appeal. Monroe, however, later voluntarily dismissed his appeal, thus we consider only the appellate arguments of Roethlisberger.

DISCUSSION

On appeal, Roethlisberger asserts that because Monroe actually resides in Douglas County, not Washoe County, and because no other defendant resides in Washoe County, venue is improper there under NRS 13.040. He also asserts that the district court abused its discretion in concluding that convenience and the ends of justice did not require removal to Douglas County under NRS 13.050(2).

McNulty, however, raises a threshold argument, contending that because venue is proper as to Roethlisberger, he lacked standing to seek a change of venue under NRS 13.040. We agree.

Roethlisberger lacked standing to request a change of venue under NRS 13.040

[Headnotes 1-3]

'' 'Standing is the legal right to set judicial machinery in motion.' '' *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004) (quoting *Smith v. Snyder*, 839 A.2d 589, 594 (Conn. 2004)). Because standing concerns a question of law, we conduct de novo review. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011).

With respect to tort actions, NRS 13.040 provides that if no defendants reside within the state, then the plaintiff can choose any Nevada county in which to file the complaint. Thus, if Roethlis-

berger was the only defendant, McNulty could have filed the action in any county in Nevada, meaning that venue in Washoe County is proper under NRS 13.040 as to Roethlisberger. But when an action is also brought against Nevada residents, it ''shall be tried in the county in which the defendants, or any one of them, may reside at the commencement of the action.'' *Id*. Correspondingly, here, Roethlisberger bases his request for a change of venue pursuant to NRS 13.040 on the residence of another defendant, Monroe. That, he cannot do.

[Headnotes 4, 5]

Venue based on one's residence is a privilege personal to each defendant. *See Pratt v. Rowland*, 769 F. Supp. 1128, 1132 (N.D. Cal. 1991); 77 Am. Jur. 2d *Venue* § 42 (2006). If we were to allow a defendant to assert improper venue on behalf of one of his codefendants, we would be revoking that codefendant's right to waive improper venue. *See* NRS 13.050(1) (''If the county designated . . . be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant . . . demand in writing that the trial be had in the proper county.''). Thus, when venue is proper as to one defendant, that defendant may not argue that venue is improper based on a codefendant's residence. *See, e.g.*, *Pratt*, 769 F. Supp. at 1132 (''[O]ne defendant may not challenge venue on the ground that it is improper as to a co-defendant.''); *Mitchell v. Jones*, 158 S.E.2d 706, 709 (N.C. 1968) (concluding that a defendant lacked standing to assert that venue should be transferred to a codefendant's county of residence after that codefendant had been dismissed from the action and citing to *Allen-Fleming Co. v. Southern Ry. Co.*, 58 S.E. 793 (N.C. 1907), for the proposition that a defendant as to whom venue is proper cannot complain as to the propriety of venue for another defendant); 92A C.J.S. *Venue* § 68 (2010) (''A defendant may object to the venue on his or her own behalf but may not object on the ground that the venue is erroneously laid as to a codefendant.'').

[Headnote 6]

Because venue in Washoe County was not improper as to Roethlisberger, he lacked standing to request a change of venue pursuant to NRS 13.040. Only a defendant who claims to be a resident of Douglas County, such as Monroe, could have requested the change in venue pursuant to NRS 13.040.[1] Because Roethlisberger lacked standing to move for a change in venue, the district court properly denied his NRS 13.040 motion, and we affirm that denial. Accordingly, we turn now to Roethlisberger's other argument, that

[1]When a defendant requests a change of venue, the district court must consider if that defendant has the right to assert that venue is improper and, thus, to request the change of venue.

venue should be transferred to Douglas County under NRS 13.050(2) for reasons of convenience and justice.

The district court properly refused to transfer venue under NRS 13.050(2)

[Headnotes 7, 8]

NRS 13.050(2)(c) gives the district court wide discretion to grant a motion to change venue ''[w]hen the convenience of the witnesses and the ends of justice would be promoted by the change.'' We review a district court's ruling on a motion brought under NRS 13.050(2)(c) for an abuse of discretion. *Fabbi v. First National Bank*, 62 Nev. 405, 414, 153 P.2d 122, 125 (1944).

The record contains no evidence demonstrating that the convenience of the witnesses compels a change in venue or that holding the trial in Douglas County rather than in Washoe County would promote the interests of justice. The difference in travel times to the courts in either county are, for many witnesses, relatively minimal. And while Roethlisberger may receive a speedier trial in Douglas County, it is not an abuse of discretion for the district court to conclude that the ends of justice are adequately served by keeping venue in Washoe County and would not be furthered by a change of venue to Douglas County. We conclude that the district court did not abuse its discretion in denying Roethlisberger's motion to transfer venue under NRS 13.050(2).

Accordingly, because Roethlisberger lacked standing to demand that venue be changed under NRS 13.040 and has shown no abuse of discretion with regard to the district court's NRS 13.050(2) determination, we affirm the district court's order refusing to change venue.

DOUGLAS, C.J., and CHERRY, SAITTA, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

AUDREY RENNELS, APPELLANT, *v.* ROGER RENNELS AND JENNIFER RENNELS, RESPONDENTS.

No. 53872

August 4, 2011 257 P.3d 396

Appeal from a district court order granting respondents' motion to terminate grandparent visitation with respondents' minor child. Eighth Judicial District Court, Family Court Division, Clark County; Steven E. Jones, Judge.

Grandmother filed motion to compel father to comply with stipulated visitation order setting forth visitation schedule between grandmother and child. Father and mother filed motion to terminate grandmother's visitation rights. The district court terminated grandmother's visitation rights. Grandmother appealed. The supreme court, HARDESTY, J., held that: (1) stipulated visitation order between father and grandmother was a final order entitled to res judicata protections; (2) when a parent seeks to modify or terminate the judicially approved visitation rights of a nonparent, the presumption that a fit parent acts in the best interest of his child is no longer controlling; and (3) the district court failed to articulate any substantial change in circumstances before terminating grandmother's judicially approved visitation with child, and, thus, it was not in child's best interest to terminate visitation.

Reversed and remanded.

[Rehearing denied September 13, 2011]

[En banc reconsideration denied November 15, 2011]

Hutchison & Steffen, LLC, and *Michael K. Wall*, Las Vegas, for Appellant.

Law Office of Daniel Marks and *Daniel Marks*, Las Vegas, for Respondents.

1. CHILD CUSTODY.

   The supreme court generally reviews the district court's decisions regarding child custody, including visitation schedules, for an abuse of discretion, because child custody matters rest in the district court's sound discretion.

2. CHILD CUSTODY.

   On the supreme court's review of a child custody determination, the district court's factual findings will not be set aside if supported by substantial evidence.

3. CHILD CUSTODY.

   Determining whether a stipulated child visitation order is final is a question of law subject to de novo review.

4. CHILD CUSTODY.

   There is strong public policy favoring the prompt agreement and resolution of matters related to the custody, care, and visitation of minor chil-

dren; therefore, courts encourage voluntary resolution of these matters and will generally recognize the preclusive effect of such agreements if they are deemed final, except when a moving party seeks to introduce evidence of domestic violence of which it was unaware at the time of the original custody decree.

5. JUDGMENT.
   An order is final, for preclusion purposes, if it disposes of the issues presented in the case and leaves nothing for the future consideration of the court.
6. JUDGMENT.
   The finality of an order, for preclusion purposes, is determined based on what the order actually does, not what it is called.
7. CHILD CUSTODY.
   Once a final judgment is entered in a nonparental visitation matter, whether in a contested hearing or by stipulation, it has a preclusive effect on later litigation; this serves to prevent parties from relitigating the same issues.
8. CHILD CUSTODY.
   Stipulated visitation order between child's father and grandmother was a final order entitled to res judicata protections, as order memorialized the parties' agreement, set forth the specific parameters for grandmother's visitation with child, and provided for modification of the visitation arrangements with the approval of the guardian ad litem and psychologist, neither party challenged the order for over two years, they expressly intended to avoid further involvement with the district court, in that they stipulated to mediate any future disputes with the guardian ad litem, and, as part of their stipulation, they vacated the evidentiary hearing that had been scheduled to resolve grandmother's visitation rights.
9. CHILD CUSTODY.
   There is a presumption that fit parents act in the best interests of their children; therefore, when a nonparent requests visitation with a child, courts must accord at least some special weight to the fit parents' wishes. NRS 125C.050(4), (6).
10. CHILD CUSTODY.
    When a parent seeks to modify or terminate the judicially approved visitation rights of a nonparent, the presumption that a fit parent acts in the best interest of his child is no longer controlling. NRS 125C.050(4), (6).
11. CHILD CUSTODY.
    Modification or termination of a nonparent's judicially approved visitation rights is only warranted upon a showing of a substantial change in circumstances that affects a child's welfare such that it is in the child's best interest to modify the existing visitation arrangement.
12. CHILD CUSTODY.
    The district court failed to articulate any substantial change in circumstances before terminating grandmother's judicially approved visitation with child, and, thus, it was not in child's best interest to terminate visitation. NRS 125.480(4).
13. CHILD CUSTODY.
    The requirement that a party requesting modification or termination of a nonparent's judicially approved visitation arrangement demonstrate a substantial change in circumstances affecting the welfare of the child is based on the principle of res judicata and prevents persons dissatisfied with custody decrees from filing immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts.

14. CHILD CUSTODY.

In evaluating whether a parent's request to modify or terminate a nonparent's judicially approved visitation is in the best interest of the child, courts should consider the best interest factors set forth in statute governing child custody as well as any other relevant considerations, and in applying these factors, the district court must consider that custodial stability is of significant concern when considering a child's best interest. NRS 125.480(4).

Before SAITTA, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

Grandparents and other nonparents are typically not entitled to visitation with a minor child as a matter of right because there is a recognized presumption that a parent's desire to deny visitation is in the best interest of the child. However, pursuant to NRS 125C.050, a grandparent or other nonparent may be granted judicially approved visitation rights in some instances. The first issue presented in this appeal is whether the stipulated visitation order between a parent and a grandmother was a final decree entitled to res judicata protections. We conclude that it was, so we must next examine whether the parental presumption continues to apply when a parent seeks to modify or terminate a nonparent's judicially approved visitation rights with a minor child. We conclude that the parental presumption applies at the time of the court's initial determination of a nonparent's visitation rights. However, when, as in this case, a parent seeks to modify or terminate the judicially approved visitation rights of a nonparent, the parental presumption is no longer controlling.

In so concluding, we adopt the two-prong test enunciated in *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007), in circumstances where a party seeks to modify or terminate a nonparent's judicially approved visitation rights with a minor child, and we now hold that modification or termination of a nonparent's judicially approved visitation rights is only warranted upon a showing of a substantial change in circumstances that affects a child's welfare such that it is in the child's best interest to modify the existing visitation arrangement. *Id.* Applying the test to this case, we conclude that the district court failed to articulate any substantial change in circumstances before it terminated appellant's nonparent visitation rights with her granddaughter and, therefore, it is not in the best interests of the child to terminate visitation. Thus, we reverse.

FACTS

Respondent Roger Rennels and Martha Contreras were married in 1994 and had a child, Martina, in 1999. In 2001, the couple divorced, and Roger received sole custody of Martina. Approximately two months after Roger and Martha divorced, Roger and Martina resided with Roger's mother, appellant Audrey Rennels, in northern California. They lived with Audrey for five months, during which time Martina and Audrey enjoyed a close relationship. After living with Audrey, Roger and Martina moved to Texas. Martina and Audrey remained close after the move. Audrey also visited Roger and Martina in Texas several times, and Martina visited Audrey for several weeks in 2002. In July 2003, Roger and Martina moved to Las Vegas. Thereafter, Roger married his current wife, respondent Jennifer Rennels, and Jennifer adopted Martina in June 2006.

According to Audrey, Roger disapproved of the frequent contact between Martina and Audrey, and he stopped allowing Martina to see Audrey in June 2004. In response, Audrey sought court-ordered nonparental visitation pursuant to NRS 125C.050, which allows a nonparent to seek visitation rights. Roger opposed Audrey's petition and also filed a motion to dismiss or for summary judgment.

The district court conducted a hearing in December 2005 and denied the motion to dismiss, noting that an evidentiary hearing was required because there is a rebuttable presumption that granting nonparental visitation over a parent's objection is not in the child's best interest. Before the evidentiary hearing occurred, however, the parties reached a settlement of the visitation issues. Pursuant to this settlement, the parties prepared and submitted to the court a stipulation and order in which they agreed that ''all pending issues'' between them were resolved and specified a detailed visitation schedule for Audrey. The district court approved the stipulation and issued a visitation order effecting its provisions.

The visitation order included the appointment of a guardian ad litem and allowed Audrey to have four supervised visits with Martina per year. The guardian ad litem was instructed to select a psychologist, and Audrey, Roger, and Martina were required to undergo counseling with the selected psychologist. The supervised visitation requirement was to be reviewed every six months by the guardian ad litem and the psychologist to determine whether supervision was still necessary. Under the visitation order, if the guardian ad litem and the psychologist concluded that Audrey could have unsupervised visits, Roger would abide by that determination. The order also provided that, before involving the dis-

trict court again, the parties would attempt to mediate any visitation disputes with the guardian ad litem.

The parties apparently followed the visitation order until 2008. During this time, the psychologist, Dr. John Paglini, gave generally favorable reports regarding Audrey and Martina's visits, and he ultimately recommended unsupervised visitation. However, Roger refused to allow unsupervised visits. In December 2008, three months after Dr. Paglini recommended unsupervised visits, Audrey filed a motion to compel Roger to comply with the visitation order. In her motion, Audrey asserted that she was entitled to unsupervised visits based on the visitation order and Dr. Paglini's recommendation. Roger and Jennifer opposed Audrey's motion and, concurrently, filed a countermotion to terminate Audrey's visitation rights altogether. They argued that the district court failed to comply with *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion), which held that parents have a due process right to make child rearing decisions, and this creates a presumption that a parent's wishes are in the best interests of the child. *Id.* at 69-70. In reply, Audrey argued that the district court complied with *Troxel*, and that the parties stipulated to a visitation schedule. She further contended that the stipulated visitation order was a final judgment and therefore res judicata principles applied.

After hearing the parties' arguments on the motions, the district court denied Audrey's motion to compel Roger's compliance with the stipulated visitation order and terminated her visitation rights. The district court reasoned, in relevant part, that: (1) Audrey had no fundamental rights to visitation in light of the presumption that fit parents act in the best interest of the child, even with a prior visitation order in place; (2) acrimony between the parties had increased; and (3) continued visitation was not in Martina's best interest. This appeal followed.

DISCUSSION

In resolving this appeal, we must first determine whether the stipulated visitation order is a final order that precluded relitigation of Audrey's right to visitation with Martina. We then consider the proper standard for determining whether modification or termination of Audrey's judicially approved nonparental visitation rights was warranted.

Standard of review

[Headnotes 1-3]

Generally, ''[t]his court reviews the district court's decisions regarding custody, including visitation schedules, for an abuse of dis-

cretion,'' *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009), because child custody matters rest in the trial court's sound discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). The district court's factual findings will not be set aside if supported by substantial evidence. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). However, ''we will review a purely legal question . . . de novo.'' *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008). Determining whether a stipulated visitation order is final is a question of law subject to de novo review.

The stipulated visitation order was final

[Headnote 4]

There is strong public policy favoring the prompt agreement and resolution of matters related to the custody, care, and visitation of minor children. *See Rivero*, 125 Nev. at 429, 216 P.3d at 226-27 (recognizing that parties are free to contract regarding child custody and such agreements are generally enforceable); *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (same). Therefore, we encourage voluntary resolution of these matters, and we will generally recognize the preclusive effect of such agreements if they are deemed final.[1] *See Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004) (explaining that the ''changed circumstances'' factor, which is required to modify a primary physical custody arrangement, is based on res judicata principles); *see also Hopper v. Hopper*, 113 Nev. 1138, 1143-44, 946 P.2d 171, 174-75 (1997); *Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997).

[Headnotes 5, 6]

An order is final if it ''disposes of the issues presented in the case . . . and leaves nothing for the future consideration of the court.'' *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (alteration in original) (internal quotations omitted). Finality is determined based on what the order ''actually *does*, not what it is called.'' *Id.* In the family law context, the California Supreme Court has held that a ''stipulated custody order is a final judicial custody determination . . . if there is a clear, affirmative indication the parties intended such a result.'' *Montenegro v. Diaz*, 27 P.3d 289, 295 (Cal. 2001). It is irrelevant whether the order is the result of a stipulated agreement between the parties that is later judicially approved or it is achieved through

[1]We recognize an exception to this rule when the moving party seeks to introduce evidence of domestic violence of which it was unaware at the time of the original custody decree. *Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004). However, domestic violence is not at issue in this case.

litigation. *Id.* at 294. Instead, the relevant inquiry is whether the order fully resolved the issues between the parties.

[Headnotes 7, 8]

Once a final judgment is entered in a nonparental visitation matter, whether in a contested hearing or by stipulation, it has a preclusive effect on later litigation. *Ingram v. Knippers*, 72 P.3d 17, 22 (Okla. 2003) (''A consent judgment is entitled to the same preclusive treatment as a contested judgment.''). This serves to prevent parties from relitigating the same issues. *Id.*; *accord Rivero*, 125 Nev. at 431, 216 P.3d at 228; *Ellis*, 123 Nev. at 151, 161 P.3d at 243; *Castle*, 120 Nev. at 105, 86 P.3d at 1047; *Hopper*, 113 Nev. at 1143-44, 946 P.2d at 174-75; *Mosley*, 113 Nev. at 58, 930 P.2d at 114.

Audrey's and Roger's actions, along with the specific language in the order, clearly demonstrate that they intended the stipulated visitation order to be final with regard to Audrey's visitation with Martina. The document signed by the parties and approved by the district court shows that the parties intended to resolve their visitation dispute through the order. For example, the parties introduced the terms of the stipulation by stating that ''this matter, as well as all pending issues, shall be resolved with the following stipulations and agreements.'' The order memorializes the parties' agreement, sets forth the specific parameters for Audrey's visitation with Martina, and provides for modification of the visitation arrangements with the approval of the guardian ad litem and Dr. Paglini.

There is no indication that the parties intended the stipulated visitation order to be anything other than a final judgment, and neither party challenged the order for over two years. The parties also expressly intended to avoid further involvement with the district court as they stipulated to mediate any future disputes with the guardian ad litem. Only if they were unable to resolve the dispute through mediation with the guardian ad litem would the matter come back to the district court. Furthermore, as part of their stipulation, the parties vacated the evidentiary hearing that had been scheduled to resolve Audrey's visitation rights. Therefore, we conclude that the stipulated visitation order is a final judgment.

Because the stipulated visitation order in this case is a final judgment, it precludes relitigation of Audrey's right to visitation with Martina based on the same set of facts the district court already considered. Thus, we must next determine under what circumstances a nonparent's judicially approved visitation rights can be modified or terminated.[2] Specifically, we examine whether par-

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[2]Roger maintains that there are differences between the nonparent visitation rights of grandparents and those of nongrandparents who have established a meaningful relationship with the child. However, all nonparents are similarly

ents are entitled to the continued presumption that their desire to restrict visitation with a nonparent is in the best interest of the child when they seek to modify or terminate the judicially approved visitation rights of a nonparent. We conclude that parents are not entitled to this presumption when they seek to modify or terminate a judicially approved visitation arrangement, and we adopt the two-prong test from *Ellis* for assessing whether modifying or terminating court-ordered visitation is appropriate. 123 Nev. at 150, 161 P.3d at 242.

The parental presumption

[Headnotes 9, 10]

The United States Supreme Court has long recognized that ''there is a presumption that fit parents act in the best interests of their children.'' *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion). Therefore, when a nonparent requests visitation with a child, courts ''must accord at least some special weight'' to the fit parents' wishes. *Id.* at 70. Nevada's nonparent visitation statute also provides such deference to the parent, providing that after a parent has ''denied or unreasonably restricted visits with the child, there is a rebuttable presumption that the [nonparent's] right to visitation . . . is not in the best interests of the child.'' NRS 125C.050(4). NRS 125C.050(6) lists the threshold requirements for overcoming this presumption. The statute is silent on whether the same presumption applies when a parent seeks to modify or terminate visitation rights that the district court previously granted to a nonparent, but this court has previously determined that parents do not get the benefit of the presumption when nonparents obtain court-ordered custody of a child. *See Hudson v. Jones*, 122 Nev. 708, 713, 138 P.3d 429, 432 (2006). We now extend this holding to judicially approved nonparent visitation arrangements.

In *Hudson*, a grandmother obtained joint legal and primary physical custody of her grandchild after the child's mother was killed in a drive-by shooting related to the father's gang involvement. *Id.* at 709-10, 138 P.3d at 430. The court determined that the father was ''an unfit parent and that sufficient extraordinary circumstances existed to overcome the parental preference.'' *Id.* at 710, 138 P.3d at 430. Ten years later, the father sought to modify the district court's order granting custody to the grandmother, contending that he had turned his life around and was fit to be a parent to his child. *Id.* The district court found that the father had

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situated regarding custody and/or visitation because Nevada does not distinguish grandparents from other nonparents. *See* NRS 125C.050(2) (allowing any nonparent with whom a child has resided and has established a meaningful relationship to petition for reasonable visitation with the child).

indeed significantly changed his lifestyle. *Id*. Thus, the district court felt ''bound to apply the parental preference presumption,'' and it granted the father's request to modify the custody arrangement with the child so that he would have sole legal and physical custody. *Id*.

We reversed the district court, holding that the parental presumption does not apply to a previously ''litigated custody dispute'' because ''applying the parental preference to modifications would only 'weaken the substantial change requirement.' ''[3] *Id*. at 713, 138 P.3d at 432 (quoting *C.R.B. v. C.C.*, 959 P.2d 375, 380 (Alaska 1998), *disagreed with on other grounds as stated in Evans v. McTaggart*, 88 P.3d 1078, 1085 (Alaska 2004)). We recognized that when there is a court-ordered custody arrangement, the nonparent has effectively rebutted the parental presumption, after which the child's need for stability becomes a paramount concern. *Id*. at 713-14, 138 P.3d at 432-33. Thus, we concluded that the same test should apply to requests to modify court-ordered parent-nonparent custody arrangements as to proposed modifications of parent-parent arrangements. *Id*. at 713, 138 P.3d at 432.

[Headnote 11]

We are persuaded that this rationale also applies to requests to modify or terminate judicially approved nonparent visitation.[4] When a nonparent obtains visitation through a court order or judicial approval, the nonparent has successfully overcome the parental presumption and is in the same position as a parent seeking to modify or terminate visitation. Declining to apply the parental presumption once the court has approved nonparental visitation not only gives deference to a court's order, but it also promotes the important policy goal of stability for the child. *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (recognizing that stability is an important concern in making custody and visitation determinations); *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000) (stating that ''modification suits raise additional policy concerns such as stability for the child and the need to prevent constant litigation in child custody cases''). If parents can unilaterally modify or terminate visitation with nonparents, with whom a child has had an ongoing relationship, and which exists because the court has adjudicated and approved a visitation schedule, the order would serve no legal or policy purpose. Thus, we adopt the test we enunciated in *Ellis* for modifying custody arrangements among parents and apply it to

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[3]However, we held that the parental presumption continued to apply to temporary nonparent custody situations, such as temporary guardianships. *Hudson v. Jones*, 122 Nev. 708, 711-12, 138 P.3d 429, 431-32 (2006).

[4]Pursuant to NRS 125A.045, child custody determinations include visitation and modifications of visitation.

modifying or terminating judicially approved nonparent visitation rights. In *Ellis*, we concluded that ''modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification.'' 123 Nev. at 150, 161 P.3d at 242. In applying this test, the district court should evaluate the two prongs without regard to the parental preference.[5]

The Ellis test

Substantial change in circumstances affecting the welfare of the child

[Headnotes 12, 13]

The requirement that a party requesting modification or termination of a judicially approved visitation arrangement demonstrate a substantial change in circumstances affecting the welfare of the child ''is based on the principle of res judicata' and 'prevents ''persons dissatisfied with custody decrees [from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts.'''' '' *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (alteration in original) (quoting *Castle v. Simmons*, 120 Nev. 98, 103-04, 86 P.3d 1042, 1046 (2004) (quoting *Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997))). In assessing whether circumstances have sufficiently changed to modify visitation, ''courts should not take the [analysis of this] prong lightly.'' *Id.*

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[5]Other jurisdictions generally agree that *Troxel*'s parental presumption applies to the initial determination regarding visitation but not to a request to modify or terminate that agreement. In *Albert v. Ramirez*, the Court of Appeals of Virginia held that a ''judicially sanctioned consent decree'' setting forth custody and visitation for a nonparent gave the nonparent rights that are not subject to the *Troxel* parental best interest presumption. 613 S.E.2d 865, 869-70 (Va. Ct. App. 2005). Therefore, a parent who wishes to change or terminate a judicially approved agreement must first demonstrate a material change in circumstances. *Id.* at 870. To hold otherwise, the court noted, ''would render all such custody decrees void and unenforceable.'' *Id.* at 869-70. Similarly, the Court of Appeals of New Mexico held that ''*Troxel* does not shift the burden [of establishing cause] away from a parent who seeks to modify an existing order granting grandparent visitation.'' *Deem v. Lobato*, 96 P.3d 1186, 1191 (N.M. Ct. App. 2004); *see also Ingram v. Knippers*, 72 P.3d 17, 22 (Okla. 2003) (''While a fit parent contesting grandparental visitation is entitled to a presumption that the parent will act in the best interest of the child, . . . a court will not modify a valid visitation order without the moving party first showing a substantial change of circumstances.'' (internal citation omitted)); *In Interest of Ferguson*, 927 S.W.2d 766, 768 (Tex. App. 1996) (''[W]hatever effect [the parental] presumption may have in an original custody action, it cannot control a suit to change custody.'' (quoting *Taylor v. Meek*, 276 S.W.2d 787, 790 (Tex. 1955))).

While we do not address what constitutes changed circumstances sufficient enough to modify or terminate a nonparent's visitation rights, we note that the existence of some hostility between the parent and nonparent is insufficient because obviously some animosity exists between a nonparent and a parent when one party must resort to litigation to settle visitation issues. *See Mosley*, 113 Nev. at 58, 930 P.2d at 1114 (concluding generally that the fact that parents cannot get along will not justify modifying custody); *Poppe v. Ruocco*, 869 N.Y.S.2d 767, 773 (Fam. Ct. 2008) (recognizing that it is obvious that animosity between the parties exists when a grandparent must seek legal means to obtain visitation rights).

Here, neither the parties nor the district court addressed changed circumstances before the court terminated Audrey's visitation rights. Nowhere in Roger's countermotion did he contend that any change in circumstances had occurred since the district court entered its stipulated visitation order that justified reevaluating Audrey's visitation with Martina. Similarly, the district court never made specific findings regarding changed circumstances, but instead afforded deference to the parental presumption pursuant to *Troxel* and found that continued visitation with Audrey would not be in Martina's best interest. The court failed to explain what circumstances had changed and instead summarily stated that ''acrimony between the parties . . . remains and rather than diminish it appears said acrimony has increased.'' Such acrimony between a parent and a nonparent, by itself, is insufficient to demonstrate changed circumstances.

The best interests of the child

[Headnote 14]

The second prong of the test follows the statutory requirement that, in child custody determinations, '' 'the sole consideration of the court is the best interest of the child.' '' *Ellis*, 123 Nev. at 151-52, 161 P.3d at 243 (quoting NRS 125.480(1)); NRS 125A.045(1), (2). In evaluating whether a parent's request to modify or terminate a nonparent's judicially approved visitation is in the best interest of the child, courts should consider ''the factors set forth in NRS 125.480(4) as well as any other relevant considerations.''[6] *Ellis*, 123 Nev. at 152, 161 P.3d at 243. In applying these factors, the district court must consider that ''custodial stability is . . . of significant concern when considering a child's best interest.'' *Id.* at 151, 161 P.3d at 243. Accordingly, we reverse the district court's

[6]We recognize that the factors in NRS 125.480(4) apply specifically to custody of a minor child. These factors also provide guidelines for assessing the best interest of a child in the context of nonparent visitation, and the district court should apply them accordingly.

order granting Roger's motion to terminate Audrey's visitation rights and remand this matter to the district court for further proceedings consistent with this opinion. The stipulated visitation order shall remain in full force and effect until such time as the district court modifies or terminates it in a manner consistent with this opinion. Pursuant to the stipulated visitation order, visitation was not to be altered without input from both the psychologist and the guardian ad litem. It appears from the record that the appointed guardian ad litem was not involved in this matter after her initial selection of Dr. Paglini as the psychologist who would counsel the parties.[7] On remand, the district court shall appoint a new guardian ad litem before evaluating whether Audrey's supervised nonparental visitation rights should be modified based on the stipulated order entered by the district court or terminated under the two-prong test we have enunciated in this opinion.

SAITTA and PARRAGUIRRE, JJ., concur.

COLLIE HAWKINS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 54850

August 4, 2011 256 P.3d 965

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to violate the Uniform Controlled Substances Act. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

The supreme court, PICKERING, J., held that the district court was justified in accepting State's race-neutral reason for prosecutor's strike of three jurors from jury.

Affirmed.

[Rehearing denied October 7, 2011]

[En banc reconsideration denied December 20, 2011]

Philip J. Kohn, Public Defender, and *Howard S. Brooks*, Deputy Public Defender, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.

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[7]In a September 2008 letter, Dr. Paglini noted that there was no guardian ad litem with whom he could consult regarding his assessment of the parties.

1. JURY.
   The district court was justified in accepting as race-neutral reason for prosecutor's strike of Middle-Eastern computer science professor from jury that ''professors are notoriously liberal'' and that he did not like them on his juries, in prosecution for conspiracy to violate the Uniform Controlled Substances Act, as defendant failed to show purposeful discrimination or pretext or to offer any analysis of the relevant considerations, such as comparative juror analysis or disparate questioning. NRS 453.011 *et seq*.
2. CRIMINAL LAW.
   Appellate review of a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge gives deference to the trial court's decision on the ultimate question of discriminatory intent.
3. JURY.
   On a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge, among the bases for finding pretext with respect to State's proffered reason for striking a prospective jury are: (1) the similarity of answers to voir dire questions given by minority prospective jurors who were struck by the prosecutor and answers by nonminority prospective jurors who were not struck, (2) the disparate questioning by the prosecutors of minority and nonminority prospective jurors, (3) the use by the prosecutors of the ''jury shuffle,'' and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office.
4. JURY.
   An implausible or fantastic justification by the State for its exercise of a peremptory strike against a prospective juror may, and probably will, be found to be pretext for intentional discrimination for *Batson v. Kentucky*, 476 U.S. 79 (1986), purposes.
5. JURY.
   There are three stages to a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge: (1) the opponent of the peremptory challenge must show a prima facie case of racial discrimination, (2) the proponent of the peremptory challenge must then present a race-neutral explanation, and (3) the trial court must determine whether the parties have satisfied their respective burdens of proving or rebutting purposeful racial discrimination.
6. JURY.
   Failing to traverse an ostensibly race-neutral explanation for a peremptory challenge as pretextual in the district court stymies meaningful appellate review of a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge, which is deferential to the district court.

Before DOUGLAS, C.J., HARDESTY and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

Appellant Collie Hawkins contends that the district court erred by rejecting his challenges to the State's peremptory challenges of three jurors as impermissible race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986). On the record and briefs presented, we cannot sustain this claim.

[Headnote 1]

The defense objected to the State's peremptory challenges, citing *Batson*. The State responded with ostensibly race-neutral explanations for its juror strikes. In particular, the State justified removing a Middle-Eastern computer science professor from the jury because ''professors are notoriously liberal,'' further clarifying, ''I just don't like them on my juries, period.'' The defense did not challenge the State's explanations as pretextual or the district court's acceptance of them as illegitimate.[1] *But see Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004) (''Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'') (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991))).

[Headnote 2]

Appellate review of a *Batson* challenge gives deference to ''[t]he trial court's decision on the ultimate question of discriminatory intent.'' *Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (alteration in original) (internal quotation marks omitted). In *Felkner v. Jackson*, the prosecutor struck an African American from the jury because she had a master's degree in social work. 562 U.S. 594, 595 (2011). When the defense objected, citing *Batson*, the state trial court accepted the prosecutor's explanation ''that he does not 'like to keep social workers' '' and rejected the *Batson* challenge. *Id*. The defense claimed that removal on the basis of education and occupation was a form of discrimination but did not specifically challenge the reason as being pretextual until the appeal. *Id*. Both the state court and federal district court affirmed the trial court's *Batson* decision on habeas review. *Id*. at 597. However, the Ninth Circuit summarily reversed. *Id*.

The Supreme Court in *Felkner* in turn reversed the Ninth Circuit. *Id*. It held that the trial court did not act unreasonably in deeming the prosecutor's explanation about not ''lik[ing] to keep social workers'' to be ''race-neutral'' and that the determination of pretext thus came down to a credibility determination by the trial court judge. *Id*. (citing *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)); *see also Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

[Headnotes 3, 4]

As in *Felkner*, the district court in this case accepted the State's dislike of professors as an adequate explanation for the peremptory

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[1]The State also struck two Hispanic jurors, one because he served on another jury and seemed proud that the defendant was acquitted, and another because the prosecution believed the juror was lying.

challenge when the defense did not challenge the explanation as pretextual. Among the bases for finding pretext are:

> (1) the similarity of answers to voir dire questions given by [minority] prospective jurors who were struck by the prosecutor and answers by [nonminority] prospective jurors who were not struck, (2) the disparate questioning by the prosecutors of [minority] and [nonminority] prospective jurors, (3) the use by the prosecutors of the ''jury shuffle,'' and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office.

Ford v. State, 122 Nev. 398, 405, 132 P.3d 574, 578-79 (2006) (internal footnote omitted) (citing *Miller-El v. Dretke*, 545 U.S. 231, 240-65 (2005)). In addition, ''[a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination.'' *Id.* at 404, 132 P.3d at 578 (citing *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30).

Here, the defense did not develop pretext.

[Headnotes 5, 6]

There are three stages to a *Batson* challenge—(1) the opponent of the peremptory challenge must show ''a prima facie case of racial discrimination''; (2) the proponent of the peremptory challenge must then present a race-neutral explanation; and (3) the trial court must determine whether the parties have satisfied their respective burdens of proving or rebutting purposeful racial discrimination. *Purkett*, 514 U.S. at 767.

> It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden . . . . [T]o say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Id. at 768. The defense in this case, as the opponent of the challenges, stopped at step 1. Failing to traverse an ostensibly race-neutral explanation for a peremptory challenge as pretextual in the district court stymies meaningful appellate review which, as noted, is deferential to the district court.

United States v. Roberts, 163 F.3d 998 (7th Cir. 1998), is instructive. There, the prosecution peremptorily challenged an African-American juror and offered as his race-neutral explanation that the juror was a teacher and would ''not [be] neutral towards the government's case.'' *Id.* at 998. The defendant failed to point

out that there was a Caucasian teacher in the venire whom the prosecutor did not challenge, a point he tried to develop on appeal. *Id.* at 999. The Seventh Circuit recognized that the prosecutor's reason for striking the African-American teacher was ''lame,'' *id.* at 998, but, nevertheless, upheld the lower court decision to reject the *Batson* challenge as ''a finding of fact, which stands unless clearly erroneous.'' *Id.* at 999; *cf. Johnson v. Gibson*, 169 F.3d 1239, 1248 (10th Cir. 1999) (holding that *Batson* does not impose ''an independent duty on the trial court to pore over the record and compare the characteristics of jurors, searching for evidence of pretext, absent any pretext argument or evidence presented by counsel'').

It is almost impossible for this court to determine if the reason for the peremptory challenge is pretextual without adequate development in the district court. Although the district court did not make specific findings, the prosecutor's explanations for removing the jurors did not reflect an inherent intent to discriminate, and Hawkins failed to show purposeful discrimination or pretext or to offer any analysis of the relevant considerations, such as comparative juror analysis or disparate questioning. Hawkins similarly offers no relevant argument on appeal other than the summary conclusion that the prosecutor's reasons for removing the jurors were pretextual. This is not enough.

For these reasons, we conclude that the district court did not err by rejecting Hawkins' *Batson* challenge, and we affirm the judgment of conviction.

DOUGLAS, C.J., and HARDESTY, J., concur.

PEDRO T. GALLEGOS, INDIVIDUALLY AND AS ASSIGNEE OF DAVID GONZALEZ; AND DAVID GONZALEZ, INDIVIDUALLY AND AS ASSIGNOR, APPELLANTS, *v.* MALCO ENTERPRISES OF NEVADA, INC., DBA BUDGET RENT A CAR LAS VEGAS; KNIGHT MANAGEMENT INSURANCE SERVICES, LLC; AND FIRST AMERICAN PROPERTY AND CASUALTY INSURANCE COMPANY, RESPONDENTS.

No. 55633

August 4, 2011 255 P.3d 1287

Appeal from a district court summary judgment in an insurance action. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

Injured driver brought suit against rental car company and insurers based on tortfeasor's causes of action judicially assigned to

driver in proceedings executing on judgment against tortfeasor. The district court granted summary judgment to rental car company and insurers. Driver appealed. The supreme court, PARRAGUIRRE, J., held that a right of action held by a judgment debtor is personal property that can be judicially assigned in proceedings supplementary to execution of judgment.

Reversed and remanded.

[Rehearing denied October 27, 2011]

[En banc reconsideration denied March 20, 2012]

Lewis & Roca LLP and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Porter & Terry, LLC*, and *Richard T. Terry*, Las Vegas, for Appellants.

Snell & Wilmer, LLP, and *Justin L. Carley*, Las Vegas, for Respondents.

EXECUTION.

A right of action held by a judgment debtor is personal property that can be judicially assigned in proceedings supplementary to execution of judgment. NRS 10.045, 21.080(1), 21.320.

Before SAITTA, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this opinion, we clarify that rights of action held by a judgment debtor are subject to execution toward satisfaction of a judgment under NRS 21.080 and may be judicially assigned pursuant to NRS 21.320. Because, in this case, appellant Pedro Gallegos properly asserted a right of action assigned to him by another district court, we conclude that the district court in the instant action erred in determining that he lacked standing to bring the claim and in granting summary judgment to respondents on that basis. Accordingly, we reverse the district court's summary judgment and remand this matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

Gallegos was injured by appellant David Gonzalez in a hit-and-run car accident. At the time of the accident, Gonzalez was driving a car rented from respondent Malco Enterprises of Nevada, Inc., d.b.a. Budget Rent A Car of Las Vegas. When renting the car, Gonzalez purportedly purchased a supplemental renter's liability insurance (RLI) policy from Budget. This policy was issued

by respondent First American Property and Casualty Insurance Company, and was managed by respondent Knight Management Insurance Services, LLC.

Gallegos sued Gonzalez for injuries resulting from the accident and ultimately obtained a default judgment against him for over $400,000. Gonzalez failed to appear at scheduled judgment debtor exams, however, and Gallegos was unable to collect on the judgment. Accordingly, Gallegos sought a judicial assignment of Gonzalez's unasserted claims against respondents, which was granted. Specifically, the earlier district court assigned Gonzalez's unasserted claims for ''Breach of Contract, Breach of Fiduciary Duties, [and] Breach of Duty of Good Faith and Fair Dealing.'' The assigned claims related to Gonzalez's insurance policy with respondents.

Gallegos then brought the assigned claims against respondents in a separate district court action.[1] Respondents moved for summary judgment on the basis that the previous district court could not assign the right of action in a proceeding supplementary to the execution of the judgment and, thus, Gallegos lacked standing to bring Gonzalez's claims against respondents, among other things. The district court in the underlying action concluded that the previous district court's assignment order was invalid and thus granted respondents' motion for summary judgment, vacating the earlier assignment order. This appeal followed.

DISCUSSION

On appeal, appellants argue that the district court erred in granting summary judgment because Gonzalez's right of action was judicially assigned to Gallegos in the proceedings supplementary to the execution of his judgment against Gonzalez.[2] We review this issue de novo. *See State, Div. of Insurance v. State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 484 (2000) (reviewing questions of law de novo); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing a district court's grant of summary judgment de novo).

To resolve this appeal, we must determine whether a right of action held by a judgment debtor is property that can be judicially assigned in a proceeding supplementary to the execution of a judg-

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[1]Gonzalez was also named as a plaintiff, although the reason for this is unclear from the record.

[2]Because we conclude that the district court erred in granting summary judgment based upon its determination that Gonzalez's right of action was invalidly assigned, we do not address appellants' argument that the district court lacked jurisdiction to vacate the assignment order.

ment. Nevada's statutory scheme regarding enforcement of judgments is laid out in NRS Chapter 21.[3] NRS 21.320 provides that a district court ''may order any property of the judgment debtor not exempt from execution . . . to be applied toward the satisfaction of the judgment.'' Accordingly, so long as a right of action is ''property . . . not exempt from execution,'' it may be judicially assigned in satisfaction of a judgment. NRS 21.320.

To help us determine whether a right of action is ''property . . . not exempt from execution,'' we turn to NRS 21.080(1). That statute provides that: ''[a]ll goods, chattels, money and other property, real and personal, of the judgment debtor, or any interest therein of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution.'' NRS 21.080(1). NRS 10.045 further defines ''[p]ersonal property'' as including ''money, goods, chattels, *things in action* and evidences of debt.'' (Emphasis added.) *See also* NRS 10.010 (providing that the definition used in NRS 10.045 applies to the entire statutory title, including NRS 21.080). A ''thing in action,'' alternatively referred to as a ''chose in action,'' is defined as a ''right to bring an action to recover a debt, money, or thing.'' *Black's Law Dictionary* 1617, 275 (9th ed. 2009).

Based on the above statutory authority, we conclude that rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment.

This conclusion finds support in caselaw. First, interpreting a right of action as personal property subject to execution accords with this state's general policy that statutes specifying the kinds of property that are subject to execution ''must be liberally construed'' for the judgment creditor's benefit. *Sportsco Enter. v. Morris*, 112 Nev. 625, 630, 917 P.2d 934, 937 (1996). Second, our decision finds considerable support in the California Court of Appeal's holding in *Denham v. Farmers Insurance Co.*, 262 Cal. Rptr. 146 (Ct. App. 1989). In *Denham*, the court analyzed whether Nevada law permitted ''a judgment creditor [to] execute upon a judgment debtor's cause of action against its insurer,'' and concluded that ''Nevada law permits execution upon a cause of action.'' 262 Cal. Rptr. at 149, 152. We approve of the *Denham* court's reasoning and conclusion. Finally, several federal cases ap-

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[3]As a preliminary matter, the district court erroneously focused its analysis on NRS 21.330. NRS 21.330 allows for execution against property held by a third party that allegedly belongs to a judgment debtor and does not apply when a creditor seeks to execute against property held by the judgment debtor.

In this case, the property at issue is Gonzalez's right of action against respondents. While a cause of action will inevitably be asserted against some third party, the right of action itself is the property of the judgment debtor. Thus, the relevant inquiry is whether a judgment creditor may execute upon rights of action held by a judgment debtor pursuant to NRS 21.080.

plying Nevada law provide additional support for our holding. *See Kelly v. CSE Safeguard Ins. Co.*, No. 208-CV-00088-KJD-RJJ, 2010 WL 3843777, at *2 (D. Nev. Sept. 28, 2010) (recognizing that ''Nevada permits a judgment creditor to execute upon a judgment debtor's cause of action'' and permitting the judgment creditor assignee to pursue a bad-faith claim against the judgment debtor's insurer (citing *Denham*, 262 Cal. Rptr. at 151-52)); *c.f. Wilson v. Bristol West Ins. Group*, No. 2:09-CV-00006-KJD-GWF, 2009 WL 3105602, at *2 (D. Nev. Sept. 21, 2009) (''Nevada does not recognize a right of action by a third-party claimant against an insurance company for bad faith without a proper assignment of rights.'').

In light of our conclusion that a district court may assign a judgment debtor's right of action to a judgment creditor in execution of a judgment, we reverse the district court's summary judgment and remand this matter for further proceedings.[4]

SAITTA and HARDESTY, JJ., concur.

YELLOW CAB OF RENO, INC., PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE JANET J. BERRY, DISTRICT JUDGE, RESPONDENTS, AND KELLY ENCOE; AND GRANITE CONSTRUCTION, REAL PARTIES IN INTEREST.

No. 56435

August 4, 2011 262 P.3d 699

Original petition for a writ of mandamus challenging a district court order denying a motion for summary judgment in a personal injury action.

Pedestrian brought action against taxicab driver and company that owned taxicab after driver allegedly struck pedestrian with cab. The district court denied taxicab company's motion for summary judgment. Company petitioned for writ of mandamus. After grant of rehearing, the supreme court, HARDESTY, J., held that na-

[4]We note that although Gallegos signed a written release of any personal claims against respondents, that release did not encompass the first-party claims that were later assigned to him in execution of his judgment against Gonzalez. Similarly, the district court's order in a third related action dismissed only Gallegos' third-party claims against respondents and did not resolve Gonzalez's first-party claims. Because it is the assigned first-party claims that form the basis for the instant appeal, we conclude that neither the release nor the district court order in the third action support the district court's grant of summary judgment.

tional census data was to be used in determining population for purposes of applicability of taxicab leasing statute.

Petition denied.

Law Offices of Steven F. Bus, Ltd., and *Steven F. Bus*, Reno, for Petitioner.

Peter Chase Neumann, Reno, for Real Party in Interest Kelly Encoe.

Erickson, Thorpe & Swainston, Ltd., and *John C. Boyden* and *Charity F. Felts*, Reno, for Real Party in Interest Granite Construction.

Catherine Cortez Masto, Attorney General, *David W. Newton*, Senior Deputy Attorney General, and *Scott R. Davis*, Deputy Attorney General, Carson City, for Amici Curiae.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act required by law as a duty stemming from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion.
2. MANDAMUS.
   The supreme court will generally not exercise its discretion to consider petitions for extraordinary relief challenging the denial of a summary judgment motion.
3. MANDAMUS.
   The right to appeal, after a final judgment is ultimately entered, will constitute a speedy and adequate remedy that precludes extraordinary writ relief.
4. MANDAMUS.
   Mandamus relief may, in some cases, be appropriate when a case is at the early stages of litigation and policies of judicial administration apply.
5. MANDAMUS.
   The supreme court may consider a writ petition when important issues of law need clarification and considerations of sound judicial economy and administration militate in favor of granting the petition, or to further public policy.
6. AUTOMOBILES.
   For purposes of determining whether statute that authorized the leasing of taxicabs to independent contractors in counties with populations of less than 400,000, statute defining term ''population'' referred to latest United States census data, rather than state-generated tables, and therefore statute was applicable in pedestrian's negligence action against taxicab company on respondeat superior theory of liability; statute governing taxicab leasing did not expressly provide for a different population figure than that provided for in general statute defining term. NRS 0.050, 706.473.

Before DOUGLAS, C.J., HARDESTY and PICKERING, JJ.

OPINION

By the Court, HARDESTY, J.:

On November 10, 2010, this court entered an order denying this petition for a writ of mandamus. Petitioner timely petitioned for rehearing, which, after real parties in interest filed an answer, we granted in a summary order on March 10, 2011. We granted rehearing because we overlooked a material question of law regarding the application of NRS 706.473(1). We now issue this opinion to explain how the material question of law was overlooked, and we address important issues of law presented by this original petition.

In this petition, we examine whether a statutorily recognized independent contractor relationship between a taxicab business and its driver, under NRS 706.473, prevents liability for the taxicab business sued under a respondeat superior theory of liability. In addressing this issue, we must first consider whether NRS 706.473(1), which authorizes the leasing of taxicabs to independent contractors in counties with populations of less than 400,000, applied to Washoe County on the date that the underlying motor vehicle incident is alleged to have occurred. To answer this question, we take the opportunity to highlight the application of NRS 0.050, which defines the term ''population,'' as used in various Nevada Revised Statutes when another meaning for that term is not expressly provided in the statute or otherwise required by the statute's context. Because NRS 706.473 does not define population or the date for determining the population of a given county, NRS 0.050 guides our analysis. We conclude that NRS 0.050 directs the application of the United States Census rather than any state-produced tables, and at the time of the underlying incident, the population in Washoe County for purposes of NRS 706.473 was less than 400,000 based on the 2000 United States Census.[1]

The district court concluded that the nature of the relationship between the taxicab company and the cabdriver was a question of fact for the jury, without addressing NRS 706.473's potentially dispositive application. While we decline here to depart from this court's general policy of not considering writ petitions challenging the denial of summary judgment, and therefore do not order the district court to vacate its denial of summary judgment, we nevertheless note that the district court may wish to reconsider its reasoning for denying summary judgment in light of the analysis set forth below.

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[1]In 2011, NRS 706.473 was amended to increase the less-than-400,000 population limit to less than 700,000. *See* A.B. 545, 76th Leg. (Nev. 2011).

PROCEDURAL BACKGROUND

Real party in interest Kelly Encoe alleged that he was struck, on June 14, 2007, by a taxicab owned by petitioner Yellow Cab of Reno, Inc., and driven by Timothy Fred Willis in Reno, Nevada. In his second amended district court complaint, Encoe asserted that Willis was a Yellow Cab employee and that Willis's cab struck Encoe while Willis was acting in the course and scope of his employment with Yellow Cab. As a result, Encoe argued that Yellow Cab was liable for Encoe's injuries under a respondeat superior theory.

Yellow Cab moved the district court for summary judgment, arguing that NRS 706.473 authorized it to lease the taxicab to Willis, as an independent contractor, and because Willis was an independent contractor, Yellow Cab could not be held liable for the incident under a respondeat superior theory. More specifically, Yellow Cab directed the district court to the terms of the taxicab lease it signed with the cabdriver and argued that since the lease complied with the regulations authorized by NRS 706.475, the relationship must be construed, as a matter of law, as that of an independent contractor as mandated by NRS 706.473.

Encoe and his employer at the time of the alleged incident, real party in interest Granite Construction (collectively, Encoe), opposed the motion. In his opposition, Encoe argued that although NRS Chapter 706 authorizes taxicab companies such as Yellow Cab to lease taxis to independent contractors, facts that would be established, if discovery was permitted, would demonstrate that the cabdriver was, in fact, an employee of Yellow Cab, given the degree of control Yellow Cab exercised over the cabdriver. Encoe then highlighted certain facts that he argued demonstrated the high level of control Yellow Cab exercised over the cabdriver. Yellow Cab filed a reply to the opposition.

The district court entered an order denying Yellow Cab's motion for summary judgment, as it determined that the question of whether a party is an employee or an independent contractor was a question of fact, and thus, Willis's status as an employee or independent contractor was a question of fact for the jury to resolve. The district court did not address Yellow Cab's NRS 706.473 argument that, by statute, Willis is an independent contractor, which may preclude respondeat superior liability against a compliant cab company.

Yellow Cab subsequently filed the instant writ petition challenging the district court's decision. Yellow Cab contended that extraordinary writ relief is warranted to correct the district court's failure to follow the dictates of directly applicable statutory and administrative authority, reiterating its argument from district court

that since the lease it entered into with the cabdriver complied with all regulations authorized by NRS 706.475, its relationship with the cabdriver must be construed as a matter of law as that of an independent contractor and that, accordingly, respondeat superior liability cannot attach.

As directed, Encoe filed an answer to the petition, in which he primarily argued that NRS 706.473(1) merely permits the existence of an independent contractor but that it in no way necessarily follows that the statute compels, as a matter of law, a determination that a driver is an independent contractor rather than an employee. Encoe therefore argued that NRS 706.473 does not alter the fact dependency of this particular inquiry.[2] Encoe further argued that NRS 706.473(1) does not apply because, by its plain language, that statute only applies in counties with populations of less than 400,000 people. Encoe asserts that Washoe County's population exceeded that amount as of the date of the accident, as confirmed by certified population statistics provided to Encoe by the Nevada State Demographer. Yellow Cab did not seek leave of this court to file a reply to Encoe's answer.

Because Encoe appeared correct that NRS 706.473(1) was inapplicable on population grounds, based on the Nevada State Demographer's tables, and because the central challenge to the district court order denying summary judgment presented by the writ petition was that the district court ignored NRS 706.473(1), on November 10, 2010, we denied Yellow Cab's petition for writ of mandamus.

In denying the writ petition, we noted Yellow Cab's argument that the district court ignored clear dispositive statutory and administrative authority, specifically NRS 706.473, NRS 706.475, and NAC Chapter 706, for which Yellow Cab insisted supported its contention that it has an independent contractor relationship with its cabdrivers, and therefore, it cannot be held liable under a respondeat superior theory. Further, we noted that Encoe's ''answer and attached documentation ma[d]e clear, however, that these statutes are inapplicable as, under NRS 706.473(1), this authority only applies in counties with populations less than 400,000, and at the relevant time, 2007, Washoe County's population exceeded 400,000.'' Thus, we concluded that extraordinary relief was not warranted.

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[2]As an additional point of statutory interpretation, Encoe also notes that NAC 706.3751, which implements NRS 706.473, is expressly phrased as applying to both employees and independent contractors, and argues that therefore NRS 706.473 cannot be read as mandating that a cabdriver be rendered an independent contractor as a matter of law since the existence of the employee language in the administrative code should equally allow Encoe to argue that NRS 706.473 renders a cabdriver an employee as a matter of law.

After the November 10 order was entered, Yellow Cab filed a petition for rehearing.[3] On rehearing, Yellow Cab argued that this court overlooked certain controlling statutory authority, specifically NRS 0.050, in concluding that NRS 706.473(1) did not apply on population grounds and denying its writ petition on that basis. Yellow Cab argued that NRS 0.050 directs that the population totals from the 2000 United States census be applied in this case, rather than any population table produced by this state's government. According to Yellow Cab, the census places Washoe County's population below 400,000 during the relevant time period, and thus, this court's conclusion that NRS 706.473(1) was inapplicable was incorrect.

Encoe filed an answer to the rehearing petition, as directed, and did not directly dispute Yellow Cab's NRS 0.050 argument. Instead, Encoe asserted that NRS 0.050 was immaterial because summary judgment was properly denied based on the various alternative arguments contained in the answer to the writ petition, including the argument that genuine issues of material fact remained so as to preclude summary judgment.

This court then entered an order granting the rehearing petition. Our rehearing order withdrew the original disposition of the writ petition and ordered the proceedings reinstated. We issue this opinion to explain our reasoning for granting the rehearing and to fully set forth the important issues and applicable law presented by this case.

DISCUSSION

Based on the information provided by the parties' filings, it appeared that Washoe County's population was above the threshold 400,000 people on the date in question, and thus that NRS 706.473 was inapplicable. As Yellow Cab's central argument in its writ petition was that the district court manifestly abused its discretion in ignoring NRS 706.473 when it denied its motion for summary judgment, it appeared that Yellow Cab had not met its burden of demonstrating that writ relief is warranted. Accordingly, we declined to intervene and writ relief was denied.

As Yellow Cab failed to seek leave to file a reply to Encoe's answer, it effectively challenged Encoe's newly raised population analysis with his NRS 0.050 argument for the first time on rehearing. While Yellow Cab could have sought leave to file a reply in support of its writ petition, NRAP 21 is silent on any procedure for seeking leave to file a reply, and Yellow Cab asserted on rehearing that it was awaiting this court to order it to file a reply. Given this possible confusion, it appears that Yellow Cab presumed

[3]The Nevada Transportation Authority and the Nevada Taxicab Authority, as amici curiae, filed joinders to the petition for rehearing.

that it did not have the opportunity to file a response to Encoe's population-based argument prior to a rehearing petition. Thus, we elected to entertain the merits of the rehearing petition.

Regarding Yellow Cab's argument on rehearing, Encoe's population argument was presented for the first time in the mandamus proceeding before this court. In resolving Encoe's population argument, we necessarily relied on documents—the State Demographer's population statistics—that were not part of the district court record. Encoe did not cite to NRS 0.050, and based on his contentions that NRS 706.473(1) did not apply on population grounds, this court overlooked NRS 0.050, and our conclusion that NRS 706.473 did not apply to Washoe County at the time in question, based on the statute's population limitation, was incorrect. Therefore, this court misapprehended a legal issue and rehearing was warranted. NRAP 40(c)(2)(B).

Having explained our legal misapprehension, we now turn to the issues presented by this petition for a writ of mandamus.

Propriety of writ relief

[Headnotes 1-5]

A writ of mandamus is available to compel the performance of an act required by law as a duty stemming from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). This court will generally not exercise its discretion to consider petitions for extraordinary relief challenging the denial of a summary judgment motion. *Smith v. District Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). Moreover, the right to appeal, after a final judgment is ultimately entered, will constitute a speedy and adequate remedy that precludes extraordinary writ relief. *International Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59. Even so, writ relief may, in some cases, be appropriate when a case is at the early stages of litigation and policies of judicial administration apply. *Id.* at 198, 179 P.3d at 559. And this court may consider a writ petition when important issues of law need clarification ''and considerations of sound judicial economy and administration militate in favor of granting the petition,'' *id.* at 197-98, 179 P.3d at 559, or to further public policy. *Sonia F. v. Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009).

Here, we conclude that this case does not necessitate a departure from this court's general policy of declining to exercise our discretion to consider petitions challenging the denial of a summary judgment motion, and therefore we deny writ relief. *Smith*, 113 Nev. at 1344, 950 P.2d at 281. Nevertheless, as this writ petition presents an important issue of law concerning the application of

NRS 706.473 that needs clarification and highlights the existence of NRS 0.050, and as the issue may be case concluding, judicial economy warrants our consideration of this petition for extraordinary relief.

NRS 706.473 applied to Washoe County

[Headnote 6]

In Encoe's complaint, he alleges that the underlying traffic incident occurred on June 14, 2007, in Reno, Nevada. Reno is located in Washoe County. At that time, NRS 706.473(1) provided, in relevant part, that

> [i]n a county whose population is less than 400,000, a person who holds a certificate of public convenience and necessity which was issued for the operation of a taxicab business may, upon approval from the [Nevada Transportation] Authority, lease a taxicab to an independent contractor who does not hold a certificate of public convenience and necessity.

To support his contention that Washoe County's population exceeded 400,000 at the time of the incident, Encoe relies on certified statewide population statistics provided by the Nevada State Demographer. These population tables indicate that Washoe County's population on July 1, 2006, was 409,085, and that it had grown to 418,061 by July 1, 2007.

Encoe's reliance on the data provided by the Nevada State Demographer to support his contention that NRS 706.473 does not apply is misplaced, however, because it ignores NRS 0.050, which provides, in relevant part, that unless

> otherwise expressly provided in a particular statute or required by the context, ''population'' means the number of people in a specified area as determined by the last preceding national decennial census conducted by the Bureau of the Census of the United States Department of Commerce pursuant to Section 2 of Article I of the Constitution of the United States and reported by the Secretary of Commerce to the Governor pursuant to 13 U.S.C. § 141(c).

Because NRS 706.473 does not expressly provide that a different population figure, other than the last preceding national decennial census, should be used when determining the statute's application and nothing in the statute's context requires a different definition of the term population, pursuant to NRS 0.050, the population figure provided in the last preceding national decennial census is used to determine whether NRS 706.473 applies to this dispute. *See J.E. Dunn Nw. v. Corus Constr. Venture*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (applying NRS 0.025(2)'s explanation of the

arrow symbol as indicating a flush line to NRS 108.22112); *Boucher v. Shaw*, 124 Nev. 1164, 1168, 196 P.3d 959, 962 (2008) (referring to NRS 0.039's definition of the term ''person''); *Baldonado v. Wynn Las Vegas*, 124 Nev. 951, 963 n.29, 194 P.3d 96, 104 n.29 (2008) (noting NRS 0.025(1)(a) instructions for the use of the term ''may'' in the Nevada Revised Statutes); *Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488, 493 & n.8, 50 P.3d 546, 549 & n.8 (2002) (explaining that, under NRS 0.033, Carson City is treated as a county by the Nevada Revised Statutes), *disapproved on other grounds by Garvin v. Dist. Ct.*, 118 Nev. 749, 59 P.3d 1180 (2002).

The relevant inquiry in the present matter, then, is whether Washoe County had a population of 400,000 or more people on June 14, 2007, the date on which the alleged incident occurred. Applying NRS 0.050, on that date, the last preceding national decennial census would have been the 2000 census. According to the 2000 census figures, Washoe County had a population of 339,486, which places its population below 400,000 during the relevant time period.[4] As a result, we conclude that NRS 706.473 applied to Washoe County at the time of the alleged incident, and we reject Encoe's assertion that the statute is inapplicable to this dispute.

District court's failure to address Yellow Cab's NRS 706.473 argument

Having concluded that the application of NRS 706.473 to the instant dispute is not barred on population grounds, we now turn to the district court's review of Yellow Cab's NRS 706.473-based independent contractor argument. Traditionally, a determination as to whether an individual is an employee or an independent contractor for the purposes of respondeat superior liability turns on the degree of control the purported employer exercises over the individual. *See, e.g.*, *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996) (explaining that liability for acts of the individual would attach for respondeat superior purposes if it is established that the individual was under the control of the purported employer and the individual's acts were within the scope of the employment). And this court has previously held that the determination of this issue is generally a factual question. *Kornton v. Conrad, Inc.*, 119 Nev. 123, 125, 67 P.3d 316, 317 (2003) (stating that ''[g]enerally, the trier of fact determines 'whether an employee was acting within the scope of his or her employment' when the tortious act occurred'' (quoting *Evans v. Southwest Gas*, 108

[4]We take judicial notice of the 2000 U.S. Census. NRS 47.130 (permitting judicial notice of facts ''[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned'').

Nev. 1002, 1005, 842 P.2d 719, 721 (1992), *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 268 n.6, 21 P.3d 11, 13 n.6 (2001))).

As Yellow Cab points out, however, NRS 706.473 specifically authorizes the licensing of a taxicab to an independent contractor if the requirements of that statute and any administrative regulations promulgated in accordance with NRS 706.475 are met.[5] Thus, under the statutory scheme, the existence of this statutorily created independent contractor relationship turns not on the issue of control, but on whether all of the statutory and administrative requirements for creating such an independent contractor relationship have been satisfied. The statute is silent, however, as to whether the creation of an independent contractor relationship under that statute acts to bar the application of respondeat superior liability as is the case under traditional independent contractor relationships.

Unfortunately, despite the fact that the parties had briefed this issue, the district court failed to address Yellow Cab's NRS 706.473 argument. Instead, in denying Yellow Cab's summary judgment motion, the district court summarily concluded, without explanation or analysis, that whether Willis was an independent contractor or an employee was a question of fact for the jury to decide. As this issue was fully briefed, the district court should have determined whether a statutorily recognized independent contractor relationship, established through compliance with NRS 706.473 and the regulations promulgated in accordance with NRS 706.475, would allow Yellow Cab to avoid liability under a respondeat superior analysis.[6] If that question was answered in the affirmative, then the district court should have determined whether, in this case, all of the statutory and administrative requirements for creating an NRS 706.473-independent-contract relationship between Willis and Yellow Cab have been met.

While the district court did not render a thorough resolution of the issues before it on summary judgment, this court will generally not exercise its discretion to consider a writ petition chal-

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[5]NRS 706.475(1)(b) directs the Nevada Transportation Authority to adopt regulations implementing NRS 706.473 to make certain that ''the taxicab business remains safe, adequate and reliable.'' The corresponding administrative code provisions, NAC 706.375-.3754, address matters of licensing, insurance, safety, and recordkeeping.

[6]While this court has held that such liability can be avoided when a traditional independent contract relationship is found to exist, the issue of whether an NRS 706.473-statutory-independent-contract relationship bars respondeat superior liability has not been addressed by this court. As the district court failed to address this issue in denying Yellow Cab's summary judgment motion, we decline to consider this issue in the first instance.

lenging a denial of summary judgment.[7] *Smith*, 113 Nev. at 1344, 950 P.2d at 281. Our denial of the writ petition, however, is without prejudice to the district court re-evaluating the propriety of summary judgment regarding Yellow Cab's NRS 706.473-based independent contractor argument in light of the analysis set forth in this opinion.

DOUGLAS, C.J., and PICKERING, J., concur.

OTAK NEVADA, LLC, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DOUGLAS SMITH, DISTRICT JUDGE, RESPONDENTS, AND PACIFICAP CONSTRUCTION SERVICES, LLC; PACIFICAP PROPERTIES GROUP, LLC; PACIFICAP HOLDINGS XXIX, LLC; CHAD I. RENNAKER; JASON Q. RENNAKER; CHEYENNE APARTMENTS PPG, LP; AND CHRISTOPHER WATKINS, REAL PARTIES IN INTEREST.

No. 56065

September 8, 2011 260 P.3d 408

Original petition for a writ of mandamus challenging district court orders entered in a tort action.

After collision, deceased motorist's family and surviving passenger brought wrongful death and personal injury action against parties involved in construction of street improvements, alleging a construction defect. General contractor filed third-party complaint against design architect. The district court denied design architect's motion to dismiss the amended third-party complaint and granted leave to other defendants to file an amended answer and cross-claims against design architect. Design architect petitioned for writ of mandamus. The supreme court, HARDESTY, J., held that as a matter of first impression, an initial pleading in an action alleging nonresidential construction malpractice, which is served without filing the attorney affidavit and expert report required by statute, is void ab initio and of no legal effect, and thus, it cannot be cured by amendment.

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[7]We reject Yellow Cab's request for writ relief as to the district court's order allowing Encoe to amend his complaint. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (noting that mandamus will not lie to control the district court's exercise of discretion unless that discretion is manifestly abused or exercised arbitrarily or capriciously).

Petition granted.

Weil & Drage, APC, and *Jean A. Weil* and *Thomas A. Larmore*, Las Vegas, for Petitioner.

Thagard, Reiss & Brown, LLP, and *Thomas Friedman*, Las Vegas, for Real Party in Interest Pacificap Construction Services, LLC.

Lewis Brisbois Bisgaard & Smith LLP and *Mark J. Brown* and *Josh C. Aicklen*, Las Vegas, for Real Parties in Interest Pacificap Properties Group, LLC; Pacificap Holdings XXIX, LLC; Chad I. Rennaker; Jason Q. Rennaker; and Cheyenne Apartments PPG, LP.

Lewis & Roca LLP and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Simon Law Office* and *Daniel S. Simon*, Las Vegas, for Real Party in Interest Christopher Watkins.

1. COURTS; MANDAMUS.
   The supreme court may consider a writ petition when the underlying case is in the early stages of litigation and the issues are not fact-bound but involve unsettled questions of law that are likely to recur and for which resolving the questions will promote judicial economy. NRS 11.258(1), (3), 11.259(1), 34.330.
2. COURTS.
   The supreme court has original jurisdiction to issue writs of mandamus. Const. art. 6, § 4.
3. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion.
4. APPEAL AND ERROR.
   The supreme court reviews de novo the district court's statutory construction.
5. STATUTES.
   When language in a statute is clear and unambiguous, the court must give effect to the meaning and will not consider sources outside the statute.
6. PRETRIAL PROCEDURE.
   The Legislature's use of the word ''shall'' in statute providing that a district court ''shall dismiss'' a party's initial pleading alleging nonresidential construction malpractice if it is served without the party filing the required attorney affidavit and expert report, demonstrates the Legislature's intent to prohibit judicial discretion and, consequently, mandates automatic dismissal if the pleading is served without the complaining party concurrently filing the required affidavit and report. NRS 11.258(1), (3), 11.259(1).
7. PRETRIAL PROCEDURE.
   An initial pleading in an action alleging nonresidential construction malpractice, which is served without filing the attorney affidavit and expert report required by statute, is void ab initio and of no legal effect, and

thus, it cannot be cured by amendment. NRS 11.258(1), (3), 11.259(1); NRCP 15(a).

8. NEGLIGENCE.

Each party that files a separate complaint for nonresidential construction malpractice must file its own attorney affidavit and expert report, which is particularized to that party's claims. NRS 11.258(1), (3).

Before SAITTA, C.J., HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

In this extraordinary writ proceeding, we must determine whether NRS 11.259(1) compels dismissal where the initial pleading in an action alleging nonresidential construction malpractice was served without filing the attorney affidavit and expert report required by NRS 11.258(1) and (3). We take this opportunity to extend our analysis and holding in *Fierle v. Perez*, 125 Nev. 728, 740, 219 P.3d 906, 914 (2009) (interpreting NRS 41A.071's expert affidavit requirement in medical malpractice actions) to apply to a defective pleading served in violation of NRS 11.258. Such a pleading is void ab initio and of no legal effect and, thus, cannot be cured by amendment. Therefore, because the initial pleadings[1] served by certain real parties in interest in this case did not include the attorney affidavit and expert report as required by NRS 11.258, those pleadings were void ab initio, and the district court did not have discretionary authority to allow the parties to amend their pleadings to cure their failure to comply with NRS 11.258. Accordingly, we conclude that writ relief is warranted.

FACTS AND PROCEDURAL HISTORY

This wrongful death and personal injury matter arose out of claims for damages allegedly caused by a defect in street improvements to Cheyenne Avenue in Las Vegas. A vehicle operated by someone who is not a party to this writ proceeding was driving on Cheyenne when it ran into a median and collided with oncoming traffic, killing the driver of the other car and injuring the passenger, real party in interest Christopher Watkins. The decedent's family and Watkins filed suit against the parties involved in the construction project, including the other real parties in interest.

In September 2009, real party in interest Pacificap Construction Services, LLC (PCS), the general contractor, filed a third-party complaint against petitioner Otak Nevada, LLC, the design archi-

[1]The pleadings at issue in this case are a third-party complaint and a cross-claim. For simplicity, we will refer to these as ''pleadings'' unless otherwise necessary.

tect, alleging claims for negligence, breach of contract, breach of express and implied warranties, implied indemnity, express indemnity, equitable indemnity, contribution, and apportionment, and seeking declaratory relief, related to Otak's work on the Cheyenne Avenue construction project that led to the fatal automobile collision. The third-party complaint was served on Otak on September 21, 2009. However, no attorney affidavit or expert report was included with the third-party complaint or filed with the district court before the complaint's service on Otak as required by NRS 11.258. Before Otak filed a responsive pleading, in January 2010, PCS filed an amended third-party complaint that did not include allegations of breach of express or implied warranties, or claims for implied or express indemnity. The amended third-party complaint included for the first time an affidavit from PCS's attorney in which he stated that the claim had a reasonable basis in fact and law, and it also included an expert report opining that Otak's engineering services fell below the standard of care.

Otak filed a motion to dismiss PCS's amended third-party complaint on the grounds that the affidavit and report were not filed concurrently with or before the original third-party complaint, as required by NRS 11.258. Citing this court's holding in *Fierle*, 125 Nev. at 740, 219 P.3d at 914 (holding that a medical malpractice complaint filed without the statutorily required expert report is void and cannot be amended), Otak argued that the third-party complaint was void ab initio. The district court conducted a hearing and denied Otak's motion, stating that the holding in *Fierle* applied only to medical malpractice cases.

After the district court denied Otak's motion to dismiss, real parties in interest Pacificap Properties Group, LLC; Pacificap Holdings XXIX, LLC; Chad I. Rennaker; and Jason Q. Rennaker (collectively, P&R) filed a motion for leave to amend their answer and assert cross-claims against Otak. Similar to its motion to dismiss PCS's amended third-party complaint, Otak opposed P&R's motion to amend for failure to file the required attorney affidavit and expert report and argued that the cross-claim was void ab initio under *Fierle*. The district court conducted a hearing on this motion as well and granted P&R's motion to amend, and the court further found that P&R could rely on PCS's expert report instead of filing its own expert report. The district court also orally concluded that, based on its ruling that P&R could rely on PCS's expert report, Watkins[2] could also rely on PCS's expert report in amending his complaint against Otak. Otak now petitions this court for writ relief.[3]

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[2]Watkins did not file any response to Otak's writ petition.

[3]On August 6, 2010, we entered an order partially staying the proceedings below. On August 17, 2011, Otak filed a motion to lift this stay. In light of our

DISCUSSION

[Headnote 1]

In its petition, Otak maintains that the district court erred by ruling that PCS's and P&R's pleadings were not void when those parties failed to file an affidavit and expert report, as required by NRS 11.258(1) and (3). This argument raises an issue of first impression in Nevada: Is a construction design malpractice pleading void ab initio if the statutorily required attorney affidavit and expert report are not filed with the court before the initial pleading is served? Because the determination of this issue is not fact-bound and it involves an unsettled question of law that is likely to recur, and because this case is in the early stages of litigation and resolving this question now promotes judicial economy, we conclude that our consideration of this writ petition is warranted. *See County of Clark v. Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998) (concluding that addressing an issue was appropriate because it would ''likely rise again and its resolution might forestall future litigation''); NRS 34.330 (recognizing that a writ of mandamus is available only when no adequate legal remedy exists); *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008) (noting that the right to appeal from a future final judgment is not always an adequate legal remedy precluding writ relief, such as when the case is at early stages of litigation and writ relief would promote policies of sounds judicial administration); *Buckwalter v. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (recognizing that while ''[n]ormally, this court will not entertain a writ petition challenging the denial of a motion to dismiss[,] we may do so where . . . the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law'').

[Headnotes 2, 3]

This court has original jurisdiction to issue writs of mandamus. Nev. Const. art. 6, § 4. ''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion.'' *We the People Nevada v. Secretary of State*, 124 Nev. 874, 879, 192 P.3d 1166, 1170 (2008).

[Headnote 4]

The district court based its orders denying Otak's motion to dismiss PCS's third-party complaint and granting P&R's motion to file an amended answer and cross-claim on its interpretation and application of NRS 11.258. ''This court reviews a district court's

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decision today, we vacate the stay in its entirety and deny the motion as moot.

statutory construction determinations de novo.'' *Fierle*, 125 Nev. at 734, 219 P.3d at 910.

An initial pleading for nonresidential construction defect claims is void ab initio if it is served before an attorney affidavit and expert report are filed with the court

[Headnote 5]

NRS 11.258(1) and (3)[4] provide that ''the attorney . . . shall file [the affidavit and expert report] . . . concurrently with the service of the first pleading in the action.''[5] Additionally, NRS 11.259(1) provides that the district court ''shall dismiss'' a party's initial pleading alleging nonresidential construction malpractice if it is served without the party filing the required attorney affidavit and expert report. Because the phrase ''shall dismiss'' is clear and unambiguous, we must give '' 'effect to that meaning and will not consider outside sources beyond that statute.' '' *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 272, 236 P.3d 10, 16 (2010) (quoting *NAIW v. Nevada Self-Insurers Association*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010)).

[Headnote 6]

The use of the word '' '[s]hall' imposes a duty to act.'' NRS 0.025(1)(d); *see also S.N.E.A. v. Daines*, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992) (''[S]hall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature.''); *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006) (''[S]hall' is mandatory and does not denote judicial discretion.''). Thus, the Legislature's use of ''shall'' in NRS 11.259 demonstrates its intent to prohibit judicial discretion and, consequently, mandates automatic dismissal if the pleading is served without the complaining party concurrently filing the required affidavit and report. *See Washoe Med.*, 122 Nev. at 1303, 148 P.3d at 793-94.

[Headnote 7]

In *Washoe Medical Center v. District Court*, 122 Nev. at 1303, 148 P.3d at 793-94, we addressed a statutory interpretation issue similar to the one raised in this case, when we analyzed NRS 41A.071. That statute provides, in pertinent part, as follows:

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[4]NRS 11.258(2) provides an exception to the affidavit filing requirement under certain circumstances, but the facts of this case do not fit that exception.

[5]The main difference between the medical malpractice statute and the nonresidential construction design malpractice statute is that the medical malpractice statute requires the supporting documents to be filed concurrently with the *filing* of the pleading, NRS 41A.071, whereas the construction statute requires the supporting documents to be filed concurrently with *service* of the first pleading. NRS 11.258(1). This difference, however, is of no consequence to our analysis here.

> If an action for medical malpractice . . . is filed in the district court, the district court shall dismiss the action . . . if the action is filed without an affidavit, supporting the allegations contained in the action.

We determined that NRS 41A.071's mandatory language did not give the district court the discretion to allow a party to amend a complaint alleging medical malpractice that was filed without the required affidavit. *Washoe Med.*, 122 Nev. at 1303, 148 P.3d at 793-94. Later, in *Fierle*, we reasoned that because a complaint filed under NRS 41A.071 without the required affidavit was void ab initio, ''such complaints may not be amended because they are void and do not legally exist.'' 125 Nev. at 740, 219 P.3d at 914; *see also Washoe Med.*, 122 Nev. at 1300, 148 P.3d at 792. Our decision also comported '' 'with the underlying purpose of . . . [NRS 41A.071], which is to ensure that such actions be brought in good faith based [on] competent expert opinion.' '' *Fierle*, 125 Nev. at 740, 219 P.3d at 914 (first and second alterations in original) (quoting *Borger v. Dist. Ct.*, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004)). Our analysis in *Washoe Medical* and *Fierle* is equally applicable to the instant case, and thus we now extend our analysis in those cases to cases that are governed by NRS 11.258. Therefore, we conclude that because a pleading filed under NRS 11.258 without the required affidavit and expert report is void ab initio and of no legal effect, the party's failure to comply with NRS 11.258 cannot be cured by amendment. *See Fierle*, 125 Nev. at 740, 219 P.3d at 914; *Washoe Med.*, 122 Nev. at 1304, 148 P.3d at 794.

In this case, PCS served its initial pleading asserting nonresidential construction malpractice claims against Otak without concurrently filing the required attorney affidavit and expert report in direct violation of NRS 11.258, and, thus, we conclude that PCS's initial pleading is void ab initio. The provision of NRCP 15(a) that allows ''[a] party to amend the party's pleading once as a matter of course at any time before a responsive pleading is served'' is inapplicable when that pleading is void for not complying with NRS 11.258, because a void pleading does not legally exist and thus cannot be amended. *See Washoe Med.*, 122 Nev. at 1304, 148 P.3d at 794. Because the initial pleading was void for violating NRS 11.258, the district court had no discretionary authority to allow PCS to amend its pleading. Therefore, we conclude that the district court abused its discretion when it denied Otak's motion to dismiss PCS's amended third-party complaint.

[Headnote 8]

P&R, rather than simply filing an amended complaint like PCS, moved the district court for leave to amend their answer and to as-

sert cross-claims for equitable indemnity and contribution against Otak. The district court not only granted P&R's motion, but also allowed them (and Watkins, who did not even move to amend his claims against Otak) to rely on PCS's expert report, rather than requiring each party filing a claim against Otak to file their own expert report. As stated above, granting the motion to amend was reversible error because the pleading was void ab initio for being served without filing the expert report and attorney affidavit. Additionally, the district court erred by allowing P&R (and Watkins) to rely on PCS's expert report because NRS 11.258(1) provides that ''the attorney for the complainant shall file'' the expert report and affidavit. Each party that files a separate complaint for nonresidential construction malpractice must file its own expert report and attorney affidavit. *See Washoe Med.*, 122 Nev. at 1303, 148 P.3d at 793. Requiring each party to file a separate expert report and attorney affidavit that are particularized to that party's claims is not an unreasonable requirement, as each party must justify its claims of nonresidential construction malpractice based on that party's relationship with the defendant.[6]

Accordingly, for the reasons set forth above, we grant Otak's petition for extraordinary relief as to the nonresidential construction defect claims against Otak[7] and direct the clerk of this court to issue a writ of mandamus instructing the district court to set aside its earlier orders, grant Otak's motion to dismiss PCS's amended third-party complaint, and deny P&R's motion to amend its answer and cross-claim against Otak.[8]

SAITTA, C.J., and PARRAGUIRRE, J., concur.

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[6]The parties do not argue, and we do not address, whether claims of indemnity and contribution fall outside the scope of NRS 11.258(1).

[7]The other claims asserted against Otak are not at issue in this petition, but we do not foreclose the district court's evaluation of the effect of this opinion on those remaining claims.

[8]Otak also argues that the expert report did not meet other requirements outlined in NRS 11.258 and that if this court did not construe NRS 11.258 similarly to NRS 41A.071, it would be a violation of equal protection. Because we conclude that the initial pleadings against Otak were void, we do not reach the merits of these claims.

RAMON DINKHA ADAM, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 54121

September 22, 2011 261 P.3d 1063

Appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The supreme court, HARDESTY, J., held that defendant charged with trafficking in a controlled substance was not entitled to a jury instruction on the procuring agent defense, overruling *Hillis v. State*, 103 Nev. 531, 746 P.2d 1092 (1987), and *Love v. State*, 111 Nev. 545, 893 P.2d 376 (1995).

Affirmed.

[Rehearing denied November 18, 2011]

[En banc reconsideration denied February 24, 2012]

Philip J. Kohn, Public Defender, and *Jason B. Trauth* and *Audrey M. Conway*, Deputy Public Defenders, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, *Nancy A. Becker* and *Steven S. Owens*, Chief Deputy District Attorneys, and *Sonia V. Jimenez*, Deputy District Attorney, Clark County, for Respondent.

1. CONTROLLED SUBSTANCES.
   Defendant was charged with trafficking in a controlled substance and was not entitled to a jury instruction on the procuring agent defense, which provided that if a defendant was an agent of the purchaser of controlled substances, then the defendant could only be held as culpable as the purchaser; the defense was in conflict with the trafficking statutes, which made everyone involved in the transaction, from the person who manufactured the drugs to the end purchaser and everyone in between, guilty of trafficking and subject to the same potential penalty, overruling *Hillis v. State*, 103 Nev. 531, 746 P.2d 1092 (1987), and *Love v. State*, 111 Nev. 545, 893 P.2d 376 (1995). NRS 453.3385.
2. CONTROLLED SUBSTANCES.
   Under the procuring agent defense, if the jury finds that the defendant was only acting on behalf of a buyer when procuring drugs, then the defendant could not be convicted of selling drugs.
3. COURTS.
   Under the doctrine of stare decisis, the supreme court will not overturn precedent absent compelling reasons for so doing; mere disagreement does not suffice.
4. COURTS.
   The doctrine of stare decisis must not be so narrowly pursued that the law is forever encased in a straight jacket.

5. CONTROLLED SUBSTANCES.

While the procuring agent defense protects the purchaser's agent from a conviction for a charge that involves the sale of a controlled substance, it does not protect the purchaser's agent from a conviction for a charge of possession of the controlled substance.

Before SAITTA, C.J., HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

At his trial for trafficking in a controlled substance, appellant Ramon Dinkha Adam sought a jury instruction on the procuring agent defense, which generally provides that if a defendant is an agent of the purchaser, then the defendant should only be held as culpable as the purchaser. The district court rejected the instruction, even though there was some evidence, and Nevada caselaw, that supported giving the instruction. In this appeal, we revisit that prior precedent holding that the procuring agent defense is applicable to a charge of trafficking in a controlled substance. After reviewing the trafficking statute and our prior caselaw, and looking at other jurisdictions that have addressed the issue, however, we conclude that the procuring agent defense is inapplicable to trafficking charges, regardless of the theory the defendant is charged under, *i.e.*, sale, manufacture, delivery, or actual or constructive possession. NRS 453.3385. We therefore affirm Adam's conviction, and overrule prior precedent that is inconsistent with this opinion.

FACTS AND PROCEDURAL HISTORY

A confidential informant told Las Vegas Metropolitan Police Detective Mike Wilson that Adam had the ability to procure drugs. The informant then introduced Detective Wilson, undercover at the time, to Adam, who thereafter became the target of further undercover police investigation. Detective Wilson stayed in contact with Adam over the course of four months and the two built a friendship. At some point during the four-month investigation, Detective Wilson claimed that Adam told him he had ''connects'' to purchase illegal drugs. According to Detective Wilson, some time after Adam made that comment, Detective Wilson asked Adam if he could procure methamphetamine. Adam agreed to help Detective Wilson.

Adam arranged to meet the suppliers at a tattoo shop in Las Vegas.[1] He and Detective Wilson waited for them in the tattoo shop

[1]Adam's first attempt to help Detective Wilson was unsuccessful. He met with his suppliers outside of the tattoo shop, but he allegedly told the suppli-

but eventually exited the shop and waited in Adam's car. When the suppliers arrived, one of them approached Adam's car where Adam was sitting in the driver's seat and Detective Wilson was in the passenger seat. The man handed Adam what appeared to be methamphetamine through the driver's window, which Adam placed on a scale he already had in his car. After weighing the methamphetamine, Adam informed the man that the weight was not correct. The man went back to his truck and returned with more methamphetamine, which Adam added to the scale and said the amount was now correct at 15 grams. Detective Wilson previously gave Adam $500 for the methamphetamine, and he observed Adam hand the money to the supplier. Adam then handed the methamphetamine to Detective Wilson.

Adam was charged with trafficking in a controlled substance in violation of NRS 453.3385 for knowingly or intentionally having actual or constructive possession of 12.64 grams of methamphetamine.[2] At the close of evidence, Adam requested that the district court instruct the jury on the procuring agent defense. The district court denied Adam's request, indicating that Adam's request was untimely and Adam had not presented any evidence to support the instruction and finding that Adam did not act as a procuring agent because he initiated the sale when he mentioned that he had ''connects'' to get drugs. At the conclusion of trial, the jury found Adam guilty of trafficking in a controlled substance, and he was sentenced to a maximum of 48 months in prison.

DISCUSSION

[Headnote 1]

Adam asserts that the district court erred when it refused to instruct the jury on the procuring agent defense. The State argues that the district court properly declined to give the instruction and urges this court to revisit prior decisions applying the procuring agent defense to a charge of trafficking based on possession[3] because they are inconsistent with the purpose of the procuring agent defense. After reviewing our previous caselaw, the trafficking statutes, and the purpose of the procuring agent defense, we agree with the State.

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ers that the methamphetamine was of poor quality and to return with a higher quality product.

[2]Initially, Adam was also charged with and found guilty of transport of a controlled substance in violation of NRS 453.321, but the charge was later dismissed and is not at issue in this appeal.

[3]Under NRS 453.3385, a person can be guilty of trafficking in five distinct ways: (1) selling, (2) manufacturing, or (3) delivering a controlled substance, (4) bringing a controlled substance into this state, or (5) knowingly or intentionally being in actual or constructive possession of a controlled substance.

Nevada's caselaw regarding the procuring agent defense

[Headnote 2]

In 1971, this court recognized the procuring agent defense, which was first announced in *United States v. Sawyer*, 210 F.2d 169 (3d Cir. 1954). *See Roy v. State*, 87 Nev. 517, 489 P.2d 1158 (1971). Under this defense, if the jury finds that the defendant was only acting on behalf of a buyer when procuring drugs, then the defendant could not be convicted of selling drugs. *Sawyer*, 210 F.2d at 170; *Roy*, 87 Nev. at 519, 489 P.2d at 1159. In *Buckley v. State*, 95 Nev. 602, 604, 600 P.2d 227, 228 (1979), we held that the procuring agent defense is not applicable when the defendant is charged with the crime of possession.[4]

Several years after the trafficking statutes were adopted, this court considered the procuring agent defense's applicability to charges of trafficking based on possession and held that ''[e]ven when possession for sale is not specifically alleged, the [procuring agent] instruction may be required where possession was clearly incidental to a contemplated sales transaction initiated by an informant.'' *Hillis v. State*, 103 Nev. 531, 535, 746 P.2d 1092, 1095 (1987). We have since relied on *Hillis* for the general proposition that ''the procuring agent defense *is* applicable to a trafficking case where the State charges trafficking on a theory of possession, but the facts reveal a sale was contemplated.'' *Love v. State*, 111 Nev. 545, 548-49, 893 P.2d 376, 378 (1995).

Overturning Nevada precedent

[Headnotes 3, 4]

''[U]nder the doctrine of *stare decisis*, [this court] will not overturn [precedent] absent compelling reasons for so doing. Mere disagreement does not suffice.'' *Secretary of State v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (footnotes omitted). Those compelling reasons must be '' 'weighty and conclusive.' '' *Id.* (quoting *Kapp v. Kapp*, 31 Nev. 70, 73, 99 P. 1077, 1078 (1909)). However, ''[t]he doctrine of *stare decisis* must not be so narrowly pursued that the . . . law is forever encased in a straight jacket.'' *Rupert v. Stienne*, 90 Nev. 397, 400, 528 P.2d 1013, 1015 (1974).

The weighty and conclusive reason the State offers for overturning our prior precedent is, essentially, that the Uniform Controlled Substances Act, which Nevada based its trafficking statutes

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[4]The defendant in *Buckley* was convicted of possession of a controlled substance pursuant to NRS 453.336. 95 Nev. 602, 603, 600 P.2d 227, 228 (1979). The trafficking statutes were not adopted until 1983. *See* 1983 Nev. Stat., ch. 111, §§ 2-4, at 287-88.

on, was designed to make all actors in the illicit drug deal equally culpable when a trafficking quantity of a controlled substance is involved. The State goes on to argue that that purpose would be defeated if this court allowed the use of the procuring agent defense to defend against a charge of trafficking. We agree.

The principle behind the procuring agent defense is that a person who acts solely as a procuring agent for the purchaser of drugs is a principal to the purchase, not the sale, and thus, should be held liable only to the same extent as the purchaser. Because the purchaser cannot be held liable for selling the drugs, neither can the purchaser's agent. 25 Am. Jur. 2d *Drugs and Controlled Substances* § 185 (2004). The purchaser typically is liable for possession of the drugs and, therefore, that is the extent of his procuring agent's liability as well—which explains why this court summarily held in *Buckley* that the procuring agent defense does not apply to the crime of possession.[5]

[Headnote 5]

The same point is implicit in the seminal procuring agent case, wherein the Third Circuit Court of Appeals concluded its discussion recognizing the defense with the observation that ''[t]he government having elected to charge the defendant with the crime of sale *rather than illegal possession*, the jury should have been alerted to the legal limitations of the sale concept in relation to the circumstances of this case.'' *Sawyer*, 210 F.2d at 170 (emphasis added); *accord People v. Hall*, 622 P.2d 571, 572-73 (Colo. Ct. App. 1980) (explaining that procuring agent defense negates an essential element of the sales offense—the sale itself—and therefore the defense is not applicable in a prosecution for mere possession); *State v. Osburn*, 505 P.2d 742, 746 (Kan. 1973) (''Where possession of a substance, such as a narcotic, is unlawful a procuring agent for a purchaser may be convicted of unlawful possession thereof . . . .''). Thus, while the procuring agent defense protects the purchaser's agent from a conviction for a charge that involves the sale of a controlled substance, it does not protect the purchaser's agent from a conviction for a charge of possession of the controlled substance.

Although this court implicitly recognized this conceptual limitation on the procuring agent defense with the holding in *Buckley*,

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[5]The case cited as support in *Buckley* provides a more detailed explanation focusing on the fact that the procuring agent defense ''[c]onceptually . . . does not fit within the ambit of mere possession, as distinguished from possession with intent to sell, since the former contains no element pertaining to or any exception in respect to an agent or person possessing on behalf of another.'' *People v. Sierra*, 379 N.E.2d 196, 199 (N.Y. 1978), *cited in Buckley*, 95 Nev. at 604, 600 P.2d at 228.

95 Nev. at 604, 600 P.2d at 228, that ''the agency defense is inapplicable to the crime of possession,'' no mention was made of that limitation or *Buckley* when this court first considered whether the procuring agent defense applies to a charge of trafficking in a controlled substance in *Hillis*. The *Hillis* court held that the procuring agent defense is applicable to a trafficking charge that is based on a theory of possession if the facts reveal that the ''possession was clearly incidental to a contemplated sales transaction.'' 103 Nev. at 535, 746 P.2d at 1095. The court in *Hillis* asserted that the ''principle enunciated in *Roy*[, 87 Nev. 517, 489 P.2d 1158,] logically extends to the charge of possession for the purpose of sale.'' *Id*. That logical extension makes sense: the procuring agent defense applies to a charge of *possession for the purpose of sale* because the defense negates an element of the offense—the intent to sell the controlled substance, *see* NRS 453.337—the same as it negates the sales element in a charge of selling a controlled substance. But that logical extension does not explain the *Hillis* court's next conclusion: ''Even when possession for sale is not specifically alleged, the instruction may be required where possession was clearly incidental to a contemplated sales transaction initiated by an informant.'' 103 Nev. at 535, 746 P.2d at 1095. That conclusion was not supported by any authority. More importantly, the *Hillis* court's ultimate conclusion suffers from at least two fatal flaws.

The first flaw in *Hillis*'s conclusion is that it does not comport with the principle behind the defense: that the purchaser's agent should be held liable only to the same extent as the purchaser. Although the purchaser clearly is liable for a charge of trafficking based on actual or constructive possession of a trafficking quantity of a controlled substance, *Hillis* would absolve the purchaser's agent of that same liability. This is in direct conflict with the trafficking statutes, which make *everyone* who has any part in the transaction—from the person who manufactured the drugs to the end purchaser and everyone in between—guilty of the same offense (trafficking) and subject to the same potential penalty when a trafficking quantity of a controlled substance is involved. *See, e.g.*, NRS 453.3385. In contrast, when a trafficking quantity is not involved, the sale offenses typically carry harsher penalties than the possession offense. *Compare* NRS 453.336 (providing that first and second offense of simple possession is category E felony), *with* NRS 453.321 (providing that sale of controlled substance is category B felony), *and* NRS 453.338 (providing that first and second offense of possession for the purpose of sale is category D felony). It therefore makes a difference in that context whether the

defendant is charged with a sales offense or simple possession. As a result, the procuring agent defense has a place when the transaction involves a nontrafficking amount—it ensures that the purchaser's agent has only the same liability as the purchaser rather than the greater liability imposed on the seller. But because the trafficking statutes do away with any distinction between seller and buyer for all practical purposes, the statutes already achieve the result that would otherwise be achieved by the procuring agent defense, and, thus, there is no place for the defense when the charge is trafficking.

The second flaw in *Hillis*'s conclusion is that it disregards how the procuring agent defense works as a defense. The procuring agent defense works as a defense to a charge of selling a controlled substance because it negates an element of the offense—the sale. When the charge is simple possession, *see* NRS 453.336, or trafficking based on possession, *see* NRS 453.3385-.3395, the defense does not negate an element of the offense, and therefore it does not work as a defense to those charges. The court seemingly recognized this problem in *Love v. State*, 111 Nev. 545, 893 P.2d 376 (1995), in the context of deciding who has the burden of proof regarding the procuring agent defense. There, the court rejected the State's argument that the instructions adequately informed the jury regarding the State's burden of proof on the procuring agent defense because the instructions gave the impression that the elements of trafficking and the procuring agent defense were two separate issues: ''This is a result of the State having charged Love with trafficking based purely on possession: *the procuring agent defense does not negate any element of the trafficking offense on which the jury was instructed*.'' *Id*. at 550, 893 P.2d at 379 (emphasis added). Despite that observation, the *Love* court did not question the idea that the State had the burden of proof on the defense, which is only the case if the defense negates an element of the offense. *See id*. at 549-51, 893 P.2d at 378-79. *Love* thus is internally inconsistent—it indicates that the State had the burden of proof on the procuring agent defense because the defense negates an element of the charged offense, but because the State charged the defendant with trafficking based solely on possession, there was no element of the offense for the procuring agent defense to negate.

Based on the above, we overrule our prior cases insofar as they have allowed a defendant to use the procuring agent defense to defend against a charge of trafficking in a controlled substance based on a possession theory. Accordingly, we conclude that the district court reached the correct result, albeit for the wrong reasons,

when it refused to instruct the jury on the procuring agent defense, *see Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970), and we affirm the judgment of conviction.[6]

SAITTA, C.J., and PARRAGUIRRE, J., concur.

JEROME TIMOTHY FORD, AKA JEROME FORD, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 52272

September 29, 2011 262 P.3d 1123

Appeal from a judgment of conviction, pursuant to a jury verdict, of pandering of prostitution. Eighth Judicial District Court, Clark County; J. Charles Thompson, Judge (sentencing); and David Barker, Judge.

The supreme court, PICKERING, J., held that: (1) statute governing offense was not unconstitutionally overbroad and vague; (2) defendant's words and conduct constituted completed crime of pandering, even though target was undercover police officer who disavowed having been or intending to become prostitute; and (3) the district court's failure to instruct on specific intent was plain error.

Reversed and remanded.

P. David Westbrook, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Michael J. Watson*, Deputy District Attorney, Clark County, for Respondent.

1. CONSTITUTIONAL LAW.

The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible appli-

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[6]Adam also argues that cumulative error warrants reversal and that the district court erred by (1) denying his motion to discover the identity of the confidential informant, (2) allowing a police detective that filmed the drug transaction to narrate that film during trial, (3) refusing to allow Adam to argue in closing argument that the drug suppliers were the confidential informants, and (4) failing to instruct the jury on lesser included offenses. We conclude that these arguments are without merit and require no further discussion. Adam's final argument is that there is not sufficient evidence to support a guilty verdict, but after reviewing the evidence in the light most favorable to the prosecution, we conclude that there is sufficient evidence to support the verdict. *See Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

cations of the law are substantial when judged in relation to the statute's plainly legitimate sweep. U.S. CONST. amend. 1.

2. CONSTITUTIONAL LAW.
   Under the vagueness doctrine, a conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. U.S. CONST. amend. 14.
3. CONSTITUTIONAL LAW.
   Proponent of constitutional challenge has the burden of establishing a statute's invalidity.
4. CONSTITUTIONAL LAW; CRIMINAL LAW.
   First step in both overbreadth and vagueness analysis is to construe the challenged statute.
5. PROSTITUTION.
   Statute governing offense of pandering of prostitution required specific intent, rather than providing for strict criminal liability; statute did not impose strict liability on person who unintentionally caused another to engage in prostitution, and statute criminalized act of soliciting another person with specific intent that, in response to solicitation, target become a prostitute or continue to engage in prostitution. NRS 201.300(1)(a).
6. CRIMINAL LAW.
   Courts take particular care to avoid construing a statute to dispense with mens rea when doing so would criminalize a broad range of apparently innocent conduct.
7. CONSTITUTIONAL LAW.
   When the language of a statute admits two constructions, one of which would render it constitutional and valid and the other unconstitutional and void, the construction that saves the statute should be adopted.
8. CONSTITUTIONAL LAW.
   Although First Amendment speech protections are far-reaching, there are limits; speech integral to criminal conduct, such as fighting words, threats, and solicitations, remain categorically outside its protection. U.S. CONST. amend. 1.
9. CONSTITUTIONAL LAW.
   In the case of a criminal solicitation, the speech, that is asking another to commit a crime, is the punishable act outside First Amendment protection. U.S. CONST. amend. 1.
10. CONSTITUTIONAL LAW.
    Offers to engage in illegal transactions are categorically excluded from First Amendment protection. U.S. CONST. amend. 1.
11. CONSTITUTIONAL LAW; PROSTITUTION.
    Statute governing offense of pandering of prostitution was not unconstitutionally overbroad under First Amendment; statute required that defendant target another person with specific, subjective intent of persuading him or her to become or remain a prostitute, and statute did not prohibit abstract advocacy of prostitution. U.S. CONST. amend. 1; NRS 201.300(1)(a).
12. CONSTITUTIONAL LAW.
    To invalidate a statute on First Amendment grounds at the behest of one whose conduct it permissibly forbids, the statute must be substantially overbroad. U.S. CONST. amend. 1.
13. CONSTITUTIONAL LAW.
    Overbreadth doctrine does not apply to commercial speech. U.S. CONST. amend. 1.

14. CONSTITUTIONAL LAW; PROSTITUTION.
    Statute governing offense of pandering of prostitution was not unconstitutionally vague; statute required defendant to act with specific intent to induce or compel another to become or remain a prostitute, defendant was subject to penalty for his acts and his intentions, not those of third party, and words of statute were words of common usage that had plain and ordinary meanings sufficiently definite that ordinary people using common sense could grasp nature of prohibited conduct. U.S. CONST. amend. 14; NRS 201.300(1)(a).
15. CRIMINAL LAW; PROSTITUTION.
    Defendant's words and conduct constituted completed specific intent crime of pandering of prostitution, even though target was an undercover police officer who disavowed having been or intending to become a prostitute. NRS 201.300(1)(a).
16. CRIMINAL LAW.
    It is defendant's intent that forms the basis for his criminal liability, not the intent of victims.
17. CRIMINAL LAW; PROSTITUTION.
    The district court's failure to instruct on specific intent affected defendant's substantial rights and, thus, was plain error in prosecution for pandering of prostitution; instructions on general intent created misimpression that defendant could be convicted based simply on showing that he intended to speak the words he did, rather than that he spoke them specifically intending to persuade target ''to become a prostitute'' or ''to continue to engage in prostitution.'' NRS 201.300(1)(a).

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

Jerome Ford appeals his conviction of pandering of prostitution, a felony. He contends that the statute under which he was convicted, NRS 201.300(1)(a), is unconstitutionally overbroad and vague. His challenge proceeds from a misinterpretation of the statute. NRS 201.300(1)(a) does not impose strict liability on a person who unintentionally causes another to engage in prostitution—say, the actress who romanticized prostitution in the movie *Pretty Woman*. It criminalizes the act of soliciting another person with the specific intent that, in response to the solicitation, she ''become a prostitute'' or ''continue to engage in prostitution.'' *Id*.

Thus interpreted, NRS 201.300(1)(a) survives Ford's constitutional challenge. We also reject Ford's secondary argument that pandering cannot occur when the target is an undercover police officer who disavows having been or intending to become a prostitute. The jury instructions, however, did not adequately describe

the specific intent required for pandering. For this reason, we reverse and remand for a new trial.

I.

Ford's conviction grows out of a sting operation that the Las Vegas Metropolitan Police Vice Squad conducted on the Las Vegas Strip. An undercover officer, Leesa Fazal, posed as a prostitute. Ford approached Fazal who, unknown to Ford, was wearing a wire under her skimpy dress. Captured on audiotape, the two discuss the fact that Fazal was ''working''; that she'd been paid $300 for a 30-minute, ''full service'' date earlier that evening; that Ford had a ''bi-coastal'' escort service in Atlantic City and Las Vegas that he advertised (or planned to advertise) on yellowpages.com; and that with him, ''You're going to make more than [$300 a date], that's my point. Believe what I'm telling you.''[1] Not pulling any punches, Ford says, ''I'm about making that mother fucking money, and make that mother fucking money do miracles.''

As the conversation progressed, Ford described his business and the services he could offer Fazal. He told Fazal that he would take care of her, that he is the backbone of the business, and that he would protect her if a ''trick'' tried to attack her. Ford asked Fazal if she understood a pimp's role in her line of work. Ironically, he offered to instruct Fazal on how to properly interview a potential customer to determine if he was an undercover cop. He also offered Fazal practical advice: ''As soon as you enter the room, you get your money . . . once everything is over and you don't got the money, then the trick has the advantage.'' When Fazal said she was working without a pimp, Ford encouraged her to work with him but warned her that if she did, she would have to obey his instructions because ''it's a pimp's game.'' He said Fazal could make a lot of money if she stuck to his rules.

On appeal, Ford emphasizes that he did not ask Fazal for money, touch her, or arrange for her to have sex with anyone. He also stresses that Fazal did not decide to become a prostitute after they met and her trial testimony that she neither was nor ever would become one.

The State charged Ford with both pandering and attempted pandering. Ford contested probable cause in a pretrial petition for writ of habeas corpus that was denied. The jury convicted Ford of pandering, a category D felony. Ford was sentenced as a habitual criminal to 5 to 20 years in prison.

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[1]The district court permitted Fazal and another officer to testify to the prostitution subculture and its vernacular. ''Working'' and ''date'' refer to prostitution, while ''full service'' refers to sexual intercourse and fellatio (on the same ''date'').

II.

[Headnotes 1, 2]

Ford's principal argument on appeal is that NRS 201.300(1)(a) criminalizes speech and innocent conduct and so is overbroad under the First Amendment and impermissibly vague under the Due Process Clauses of the Fifth and Fourteenth Amendments. ''The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.' '' *Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973)). The vagueness doctrine holds that ''[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'' *United States v. Williams*, 553 U.S. 285, 304 (2008).

[Headnote 3]

Our review is de novo, *City of Las Vegas v. Dist. Ct. (Krampe)*, 122 Nev. 1041, 1048, 146 P.3d 240, 245 (2006), and Ford, as the proponent of the constitutional challenge, has the burden of establishing the statute's invalidity. *Flamingo Paradise Gaming v. Att'y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009).

A.

[Headnote 4]

The first step in both overbreadth and vagueness analysis is to construe the challenged statute. *Williams*, 553 U.S. at 293 (''it is impossible to determine whether a statute reaches too far without first knowing what the statute covers''); *Skilling v. United States*, 561 U.S. 358, 406 (2010) (''[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague . . . . And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.' '' (alteration in original) (quoting *United States v. Harriss*, 347 U.S. 612, 618 (1954))); *State v. Castaneda*, 126 Nev. 478, 483, 245 P.3d 550, 553-54 (2010) (''Enough clarity to defeat a vagueness challenge may be supplied by judicial gloss on an otherwise uncertain statute, by giving a statute's words their well-settled and ordinarily understood meaning, and by looking to the common law definitions of the related term or offense.'' (citations and quotations omitted)).

[Headnote 5]

Here, the challenged statute, NRS 201.300(1), reads as follows: ''A person who: (a) Induces, persuades, encourages, inveigles, entices or *compels* a person to become a prostitute *or to continue to engage in prostitution* . . . is guilty of pandering.'' (Emphases added). Originally enacted in 1913, 1913 Nev. Stat., ch. 233, § 1, at 356, NRS 201.300(1)(a) has not changed significantly over the years, beyond its amendment in 1977 to add the words emphasized above. 1977 Nev. Stat., ch. 510, § 1, at 1054. ''Prostitute'' and ''prostitution'' are defined terms,[2] but the serial verbs ''[i]nduces, persuades, encourages, inveigles, entices or compels,'' are not. Notably NRS 201.300(1)(a) does not specify the intent required for pandering. This is atypical of more modern criminal statutes, which often ''employ words (usually adverbs) or phrases indicating some type of bad-mind requirement: 'intentionally' or 'with intent to . . .'; 'knowingly' or 'with knowledge that . . .'; 'purposely' or 'for the purpose of . . . ,' '' and so on. 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.1(a), at 333 (2d ed. 2003) (alteration in original); *see* Model Penal Code § 2.02(2) (1985) (defining kinds of culpability).

Because NRS 201.300(1)(a) does not use any ''bad-mind'' adverbs or phrases, Ford takes the statute to impose strict liability based on cause and effect, not intent. By his account, NRS 201.300(1)(a) reaches not only the human trafficker who recruits teenage runaways for prostitution rings but also the following: The ''over-protective mother, whose constant nagging and stern disapproval encourages her daughter to engage in prostitution as an act of rebellion; [t]he amorous 22-year-old male, steeped in the 'urban' culture popularized by rap artists and other media figures, who falsely represents himself as a 'pimp' or a 'player' in the hopes of enticing a woman to sleep with him''; and Julia Roberts, whose film *Pretty Woman* suggests that ''wholesome and beautiful girls can use prostitution as a means to achieve wealth, see the world, and obtain the love of a dashing businessman like Richard Gere.''

The intent, if any, required to be convicted of pandering under NRS 201.300(1)(a) lies at the heart of Ford's appeal. If he is right and NRS 201.300(1)(a) provides for strict liability, the statute is unsustainable. But Ford misinterprets the statute. To be convicted

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[2]NRS 201.295(3) states that '' 'Prostitute' means a male or female person who for a fee engages in sexual intercourse, oral-genital contact or any touching of the sexual organs or other intimate parts of a person for the purpose of arousing or gratifying the sexual desire of either person.'' '' 'Prostitution' means engaging in sexual conduct for a fee,'' NRS 201.295(4), while '' '[s]exual conduct' means any of the acts enumerated in'' the definition of prostitute. NRS 201.295(5).

of pandering under NRS 201.300(1)(a), a defendant must act with the specific intent of inducing (or persuading, encouraging, inveigling, enticing, or compelling) his target to become or remain a prostitute. A number of factors lead us to this conclusion.

First, Ford makes too much of NRS 201.300(1)(a)'s omission of a stated intent requirement. ''While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements,'' they occupy a ''generally disfavored status'' and ''[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.'' *United States v. United States Gypsum Co.*, 438 U.S. 422, 437-38 (1978); *Morissette v. United States*, 342 U.S. 246, 263 (1952) (''mere omission . . . of intent [in a criminal statute] will not be construed as eliminating that element from the crimes denounced''); *see United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (many ''cases interpret[ ] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them'').

In *Sharma v. State*, 118 Nev. 648, 652-55, 56 P.3d 868, 870-72 (2002), we addressed the intent required for liability under another Nevada criminal statute, NRS 195.020, that, like NRS 201.300(1)(a), was enacted in the early twentieth century, Crimes and Punishments Act of 1911 § 9, *reprinted in* Nev. Rev. Laws § 6274 (1912), and does not specify an intent requirement. Using words similar to those in NRS 201.300(1)(a), NRS 195.020 provides that every person concerned in the commission of a crime is liable as a principal, whether he or she commits the act constituting the offense, aids or abets in its commission, or ''counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor.'' Even though NRS 195.020 does not state an intent requirement, in *Sharma* we interpreted it to require that the aider and abettor ''knowingly aid[ ] the other person *with the intent that the other person commit the charged crime*.'' 118 Nev. at 655, 56 P.3d at 872 (emphasis added). *See Robey v. State*, 96 Nev. 459, 461, 611 P.2d 209, 210 (1980) (''the general conditions of penal liability requir[e] not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act'' (citing *Morissette*, 342 U.S. 246)).

We therefore reject Ford's argument that NRS 201.300(1)(a)'s omission of a stated intent requirement automatically means that it provides for strict criminal liability.

Second, NRS 201.300(1)(a)'s history and apparent purpose support reading it to require specific intent of persuading the target to become or remain a prostitute.

The Nevada Legislature passed NRS 201.300(1)(a) three years after Congress passed the Mann Act, then popularly known as the ''White-Slave Traffic Act,'' 36 Stat., §§ 1-8, at 825, 825-27 (1910) (codified as amended at 18 U.S.C. §§ 2421 et seq.). Using words like those in NRS 201.300(1)(a), section 3 of the Mann Act prohibited ''knowingly persuad[ing], induc[ing], entic[ing], or coerc[ing] . . . any woman or girl to go from one place to another in interstate or foreign commerce . . . for the purpose of prostitution or debauchery, or for any other immoral purpose.''[3] Laws modeled on the Mann Act swept the country in the early 1900s in response to what historians describe as ''intense, widespread, and often hysterical'' concern with coerced prostitution. Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era* 115 (1980). *See* Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 Yale J.L. & Human. 123, 157 (2004) (''Beginning in the early 1900s, America awoke to a startling new threat: the 'existence' of an international conspiracy to seduce, entrap and ultimately enslave (white) American girls into a life of prostitution.''). The desire to protect women from coerced prostitution that drove these laws led to ''a discursive reconceptualization of the prostitute within American society, [from] 'fallen woman'—perhaps deserving of sympathy, but ultimately responsible for her position in life on account of her lax morals . . .—[to] 'white slave'—an innocent, agency-less, pre-sexual (country) girl who had been tricked into a life of prostitution by urban panders.'' *Id.* at 126. Consistent with these concerns, the Mann Act focuses on

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[3]That Nevada did not include the ''for the purpose of'' phrasing is not surprising. While the omission arguably suggests that Nevada meant to dispense with the specific intent required by the Mann Act, § 3, it seems more reasonable to take Nevada's version as reworking the federal statute's language to eliminate its interstate travel/Commerce Clause component.

Congress modernized the Mann Act in 1986 and revised its text again in the Telecommunications Act of 1996. *See* Andriy Pazuniak, *A Better Way to Stop Online Predators: Encouraging a More Appealing Approach to § 2422*, 40 Seton Hall L. Rev. 691, 694-98 (2010). Other states have similarly revised their dated prostitution and pandering laws to remove ''obsolete language,'' to replace ''archaic language'' with ''modern terminology,'' and to streamline them. *State v. Grazian*, 164 P.3d 790, 794-95 (Idaho 2007); *see also* Model Penal Code § 251.2 (1980). Nevada has added to, but not meaningfully pruned, its prostitution and pandering laws; with brothels being permitted in certain counties at local government option, this thicket of laws has led to litigation and uncertainty. *Coyote Pub., Inc. v. Miller*, 598 F.3d 592 (9th Cir. 2010), *reversing Coyote Pub., Inc. v. Heller*, No. CV-06-329-JCM-PAL, 2007 WL 2254702 (D. Nev. Aug. 3, 2007); *see* Daria Snadowsky, *The Best Little Whorehouse Is Not in Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 Nev. L.J. 217 (2005) (Winner, William S. Boyd School of Law Excellence in Writing Award 2004-05).

the defendant's intent to prostitute the victim, not whether the prostitution actually occurs. *See United States v. Rashkovski*, 301 F.3d 1133, 1137 (9th Cir. 2002) (citing *Simpson v. United States*, 245 F. 278, 279 (9th Cir. 1917)).

Similarly, our case law recognizes that the ''primary emphasis'' of NRS 201.300(1)(a) is ''upon the recruitment of females into the practice of prostitution.'' *Stanifer v. State*, 109 Nev. 304, 308, 849 P.2d 282, 285 (1993). '' '[A] ''pimp'' solicits patrons for the prostitute and lives off her earnings, while a ''panderer'' recruits prostitutes and sets them up in business.' '' *Id.* (alteration in original) (quoting 2 *Wharton's Criminal Law* § 274 (14th ed. 1979)); *see also* 2 Charles E. Torcia, *Wharton's Criminal Law* § 266, at 637 (15th ed. 1994) (''The life-blood of prostitution is not the prostitute but the parasite who 'promotes' prostitution. It is the promoter who makes prostitution a going business; therefore, his activity is usually punished more severely than prostitution itself.''). The panderer's target is seen as the victim of the crime, not a co-conspirator. ''The gist of the offense is . . . the spread of prostitution, and whether the female becomes debauched or not is unimportant in view of the emphasis on punishing the promotion and expansion of the vicious evil.'' *Commonwealth v. Stingel*, 40 A.2d 140, 142 (Pa. Super. Ct. 1944) (interpreting Pennsylvania statute almost identical to NRS 201.300(1)(a)).

To read NRS 201.300(1)(a) as imposing strict liability would shift the crime's focus from the panderer's efforts to recruit prostitutes to the success of the recruiting program—liability would depend not on what the panderer intended to achieve but the effect he caused, intended or not, which is counterintuitive.

Also significant: From the date of its original enactment until 2005, NRS 201.300(1)(a) had a companion statute providing that, ''[u]pon a trial for . . . inveigling, enticing or taking away any [person] *for the purpose of prostitution*,'' corroboration of the targeted person's testimony was required. Nev. Rev. Laws § 7177 (1912) (emphasis added); *see* Nev. Compiled Laws § 10975 (1929); 1967 Nev. Stat., ch. 523, § 447, at 1472; 1981 Nev. Stat., ch. 504, § 1, at 1029; 2005 Nev. Stat., ch. 113, § 1, at 308 (repealing corroboration requirement as to pandering). The words ''for the purpose of prostitution'' in NRS 201.300(1)(a)'s companion statute confirms that it is fair to read NRS 201.300(1)(a) as requiring specific intent.

Third, the statute's language supports, if it does not compel, a specific intent requirement, ''and there is no grammatical barrier to reading it that way.'' *United States v. Williams*, 553 U.S. 285, 294 (2008). Although a ''statute may contain no adverbs or phrases indicating a requirement of fault, some fault may be inherent in a verb . . . the statute employs (*e.g.*, whoever 'refuses' to do something or 'permits' another to do something).'' 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.1(a)(1), at 333

(2d ed. 2003). The verbs that NRS 201.300(1)(a) strings together are active; they contemplate that the subject of the sentence act with the specific purpose that his object do what he asks. Thus, *Black's Law Dictionary* defines ''persuade'' as ''[t]o induce (another) to do something''; ''encourage'' as ''[t]o instigate; to incite to action; to embolden; to help''; ''inveigle'' as ''[t]o lure or entice through deceit or insincerity <she blamed her friend for inveigling her into making the investment>''; ''entice'' as ''[t]o lure or induce; esp., to wrongfully solicit (a person) to do something''; and ''compel'' as ''1. To cause or bring about by force, threats, or overwhelming pressure.''[4] *Id.* at 1260, 607, 901, 611, 321 (9th ed. 2009).

Fourth, while the statutory formulations vary from state to state, none of the cases interpreting these statutes treats pandering (or ''promoting prostitution,'' as some places call it) as anything other than a specific intent crime. As the California Supreme Court recently held:

> We clarify here that *pandering is a specific intent crime*. Its commission requires that a defendant intends to persuade or otherwise influence the target ''to become [or remain] a prostitute.'' This . . . effectuates the purpose and intent of the pandering statute, which is to criminalize the *knowing and purposeful* conduct of any person seeking to encourage another person to work with the panderer or another pimp in plying the prostitution trade.

People v. Zambia, 254 P.3d 965, 974 (Cal. 2011) (first emphasis added) (quoting Cal. Penal Code § 266i(a)(2)).[5] Construing a

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[4]Oddly, *Black's* does not define ''induce.'' It has been defined elsewhere to mean: ''1. To lead (a person), by persuasion or some influence or motive that acts upon the will, to (into unto) some action, condition, belief, etc.; to lead on, move, influence, prevail upon (any one) *to do* something.'' *Oxford English Dictionary*, vol. VII, at 887 (2d ed. (with corrections) 1998).

[5]The California statute at issue in *Zambia*, like NRS 201.300(1)(a), is silent as to the intent required for pandering of prostitution. But the two states' pandering statutes differ in several respects. First, Nevada's is broader in that it proscribes efforts to persuade or otherwise influence a person ''to become a prostitute *or to continue to engage in prostitution*,'' NRS 201.300(1)(a) (emphasis added), while California's lacks the above-emphasized language, Cal. Penal Code § 266i(a)(2) (West 2008), obviating the issue that divided the *Zambia* court. Second, the California statute penalizes a person who ''[*b*]*y promises, threats, violence, or by any device or scheme*, causes, induces, persuades, or encourages another person to become a prostitute.'' *Id.* (emphasis added). Although the string of verbs differs slightly in each statute (Nevada adds ''compels,'' ''entices,'' and ''inveigles'' and omits ''causes''), the more significant difference is that Nevada's statute lacks the emphasized language, ''by promises, threats, violence, or by any device or scheme.'' This language strengthens the foundation for the *Zambia* court's specific intent holding. For the reasons expressed in the text, however, its absence doesn't affect our decision.

statute almost identical to Nevada's, Michigan has likewise acknowledged that specific intent is required for pandering. *See People v. Morey*, 583 N.W.2d 907, 911 (Mich. Ct. App. 1998) (finding error in a portion of the trial court's pandering instruction but not questioning its statement that pandering ''is a specific intent crime, which means that the prosecution must prove not only that the defendant did the acts but that she did the acts with the intent to cause a particular result,'' to wit: that the target ''become a prostitute''); *People v. Rocha*, 312 N.W.2d 657, 664 (Mich. Ct. App. 1981) (''The jurors were required to find that defendant knowingly and intentionally, for the purpose of prostitution, was inducing, persuading, encouraging, enticing or inveigling a female person to become a prostitute.''). *See also Bell v. State*, 668 P.2d 829, 833 (Alaska Ct. App. 1983) (jury instruction required that the defendant have ''the specific intent to cause or induce [D.W.] to engage in prostitution''); *State v. Rodgers*, 655 P.2d 1348, 1357 (Ariz. Ct. App. 1982) (jury instruction required that the ''crime of pandering requires proof that the defendant knowingly compelled, induced or encouraged another to lead a life of prostitution''); *Floyd v. State*, 575 S.W.2d 21, 24 (Tex. Crim. App. 1978) (construing ''prostitution enterprise'' as requiring an ''immediate objective to promote prostitution as a particular field of endeavor''; ''passive knowledge of the surrounding circumstances'' will not do); Model Penal Code § 251.2(2)(c) (1980) (providing that a person who ''knowingly promotes prostitution'' may be held criminally liable for ''encouraging, inducing or otherwise purposely causing another to become or remain a prostitute'').[6]

[Headnotes 6, 7]

Fifth, and finally, courts take ''particular care . . . to avoid construing a statute to dispense with mens rea where doing so would 'criminalize a broad range of apparently innocent conduct.' '' *Staples v. United States*, 511 U.S. 600, 610 (1994) (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)). Ford's examples of the overprotective mother, the young man looking for love, and movie star Julia Roberts convince us that reading NRS 201.300(1)(a) as not requiring specific intent would do just that: Criminalize innocent conduct and, at the same time, cast the

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[6]In *Glegola v. State*, 110 Nev. 344, 871 P.2d 950 (1994), we interpreted NRS 201.358(1), which prohibits prostitution or solicitation for prostitution after testing positive for AIDS to create a *general* intent offense, not requiring for its commission that the act of prostitution actually occur or even be intended (Glegola planned a ''trick roll''). The substantial public health risk involved, the difficulty in disproving a ''trick roll'' defense, and the statute's language justify the holding in *Glegola* but do not support its extension to pandering.

statute into constitutional doubt under the First Amendment and the due process principles articulated in *Flamingo Paradise Gaming v. Attorney General*, 125 Nev. 502, 514, 217 P.3d 546, 554-55 (2009), and *Robey v. State*, 96 Nev. 459, 461, 611 P.2d 209, 210 (1980). ''[W]hen the language of a statute admits of two constructions, one of which would render it constitutional and valid and the other unconstitutional and void, that construction should be adopted which will save the statute.'' *Virginia and Truckee R.R. Co. v. Henry*, 8 Nev. 165, 174 (1873).

B.

The next question is whether NRS 201.300(1)(a), as construed, criminalizes a substantial amount of protected expressive activity and thus falls to the First Amendment overbreadth doctrine. We conclude that it does not.

[Headnote 8]

As Ford notes, NRS 201.300(1)(a) permits conviction based on speech. But ''[m]any long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities.'' *Williams*, 553 U.S. at 298. ''Although First Amendment speech protections are far-reaching, there are limits. Speech integral to criminal conduct, such as fighting words, threats, and solicitations, remain categorically outside its protection.'' *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010).

[Headnotes 9, 10]

Pandering is a type of criminal solicitation. ''In the case of a criminal solicitation, the speech—asking another to commit a crime—is the punishable act.'' *Id.* (also noting that ''[s]olicitation is an inchoate crime; the crime is complete once the words are spoken with the requisite intent''). But the specific intent required—that the panderer's target become or remain a prostitute—narrows the statute to illegal employment proposals. There is no First Amendment right to pander where prostitution is illegal, as it is in Clark County. *State v. Johnson*, 324 N.W.2d 447, 450 (Wis. Ct. App. 1982) (rejecting overbreadth challenge to Wisconsin's pandering statute because ''[o]n its face [it] is directed at speakers who intentionally propose an illegal commercial transaction, and, thus, it does not, in general, implicate speech protected by the first amendment''); *see Allen v. Stratton*, 428 F. Supp. 2d 1064, 1071-72 (C.D. Cal. 2006) (rejecting overbreadth challenge to California's pandering statute). ''Offers to engage in illegal transactions are categorically excluded from First Amendment protection.'' *Williams*, 553 U.S. at 297.

Ford argues that NRS 201.300(1)(a) permits conviction of persons who do not harbor the requisite specific intent—maybe his words just involved showing off, or lying, or simply recruiting Fazal for his legitimate escort service. But that is ''a dispute over the meaning and inferences that can be drawn from the facts'' in an individual case, *White*, 610 F.3d at 962; it does not establish overbreadth.

[Headnotes 11, 12]

More troubling is Ford's argument that NRS 201.300(1)(a) may inhibit the abstract advocacy of career prostitution. As construed, however, the statute requires that the defendant target another person with the specific, subjective intent of persuading him or her to become or remain a prostitute. Thus, NRS 201.300(1)(a) does not prohibit abstract advocacy of prostitution; it forbids efforts to recruit a targeted person to work as a prostitute. To invalidate a statute on First Amendment grounds at the behest of one whose conduct it permissibly forbids, the statute must be ''*substantially* overbroad.'' *Williams*, 553 U.S. at 303. Ford has not made that showing here. *See Johnson*, 324 N.W.2d at 450 (rejecting similar overbreadth challenge to a pandering law on this basis).[7]

[Headnote 13]

Finally, a panderer recruits a person for employment as a prostitute, and employment proposals are a species of commercial speech. ''[I]t is irrelevant whether [NRS 201.300(1)(a)] has an overbroad scope encompassing protected commercial speech of other persons, *because the overbreadth doctrine does not apply to commercial speech*.'' *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 496-97 (1982) (emphasis added).

C.

[Headnote 14]

Ford makes two distinct vagueness arguments. Citing *Silvar v. District Court*, 122 Nev. 289, 129 P.3d 682 (2006), he argues,

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[7]Of note, NRS 201.354 provides that ''[i]t is unlawful for any person to engage in prostitution or solicitation therefor, *except in a licensed house of prostitution*.'' (Emphasis added.) Ford's encounter with Fazal occurred in a Las Vegas casino in Clark County, where all prostitution is illegal, given NRS 244.345(8), which, as amended in 2011, prohibits licensing houses of prostitution in counties with populations of more than 700,000. Despite reference in a footnote in his reply brief to brothels being legal in parts of Nevada, Ford does not address NRS 201.300(1)(a)'s application in counties where, at least in a licensed house of prostitution, prostitution is legal. Whether and, if so, how NRS 201.300(1)(a) applies to conduct that occurs in the context of a legal brothel is thus a question we leave for another day. In doing so we note that other more specific statutes address brothel recruitment and operation. NRS 201.360 (addressing crimes associated with placing a person in a house of prostitution); *see* NRS 201.310 (placing one's spouse in a brothel); NRS 201.330 (detaining a person in a brothel because of debt contracted while living there).

first, that NRS 201.300(1)(a) criminalizes conduct based on the effect it has on others and, thus, is inherently (and unconstitutionally) indeterminate. Second, he argues that the statute's failure to define its operative verbs leaves too much to guesswork to satisfy due process. *See Flamingo Paradise Gaming*, 125 Nev. at 512-13, 217 P.2d at 553-54 (convicting a defendant under a criminal law that fails to define key terms that lack plain meaning violates due process).

As we have construed NRS 201.300(1)(a), the defendant must have the specific intent that his target become or remain a prostitute. This requirement of specific subjective intent dispositively distinguishes NRS 201.300(1)(a) from the loitering ordinance struck down in *Silvar* and the antismoking statute considered in *Flamingo Paradise Gaming*.

The ordinance in *Silvar* made it a crime ''to loiter . . . *in a manner and under circumstances manifesting the purpose of* inducing, enticing, soliciting for or procuring another to commit an act of prostitution.'' Clark County Ordinance § 12.08.030 (2006), *reprinted in Silvar*, 122 Nev. at 292, 129 P.3d at 684 (emphasis added). We interpreted this ordinance as penalizing the defendant's loitering based on what a hypothetical viewer saw its purpose as being, not what the defendant subjectively intended. *Silvar*, 122 Nev. at 294, 129 P.3d at 685. Did the defendant's loitering demeanor ''manifest'' a prohibited purpose? The loiterer could not know this until his loitering style was rated by others and, even then, what one viewer might take as ''manifesting the purpose'' another, less suspicious or more naive viewer might not. *Id*. Thus construed, the ordinance ''tied criminal culpability to . . . untethered subjective judgments . . . [such as] whether the defendant's conduct was 'annoying' or 'indecent' '' based on how a defendant appears to a third party. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20-21 (2010); *see City of Las Vegas v. Dist. Ct.*, 118 Nev. 859, 865, 59 P.3d 477, 482 (2002), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 482 n.1, 345 P.3d 550, 553 n.1 (2010).

By contrast, NRS 201.300(1)(a) requires that the defendant actually intend to produce the prohibited result. As we recognized in *City of Las Vegas v. District Court (Krampe)*, 122 Nev. 1041, 1051, 146 P.3d 240, 247 (2006), a law that requires specific intent to produce a prohibited result may avoid vagueness, both by giving the defendant notice of what is prohibited and by affording adequate law enforcement standards. *See Hoffman Estates*, 455 U.S. at 499 (''a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice''). To be sure, conviction depends on a jury deciding whether the defendant harbored the prohibited intent. But this is a ''clear question[ ] of fact. Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as

whether conduct is 'annoying . . . .' '' *Williams*, 553 U.S. at 306. That ''close cases can be envisioned'' does not render a statute void for vagueness, *id.* at 305; that problem ''is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.'' *Id.* at 306.

Nor does the failure to define its operative verbs render NRS 201.300(1)(a) unconstitutionally vague. As discussed in the text accompanying note 4, *supra*, the words ''[i]nduces, persuades, encourages, inveigles, entices or compels'' all carry ordinary dictionary definitions. Like ''[t]he words 'attempt,' 'persuade,' 'induce,' 'entice' or 'coerce' [in 18 U.S.C. § 2422(b), formerly Mann Act, § 3],'' these ''are words of common usage that have plain and ordinary meanings . . . sufficiently definite that ordinary people using common sense could grasp the nature of the prohibited conduct.'' *United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir. 2007); *United States v. Hart*, 635 F.3d 850, 857 (6th Cir. 2011) (the failure to define ''persuade'' does not render 18 U.S.C. § 2422(b) void for vagueness; the word has '' 'a plain and ordinary meaning that does not need further technical explanation' '' and is '' 'sufficiently precise to give a person of ordinary intelligence fair notice as to what is permitted and what is prohibited and to prevent arbitrary and discriminatory enforcement.' '' (quoting *United States v. Tykarsky*, 446 F.3d 458, 473 (3d Cir. 2006))).[8]

NRS 201.300(a)(1) prohibits a person from enticing another to become or remain a prostitute, a defined term. *See supra* note 2. Because NRS 201.300(1)(a) requires the defendant to act with the specific intent to induce, persuade, encourage, inveigle, entice, or compel another to become or remain a prostitute—and the defendant is subject to penalty for his acts and his intentions, not those of a third party that he may or may not be able to control, *cf. Flamingo Paradise Gaming*, 125 Nev. at 514, 217 P.3d at 554-55 (invalidating statute that outlawed smoking in restricted areas but did not specify the obligation it imposed on business owners or employees)—we cannot say that it fails to give adequate notice of the conduct it prohibits or gives law enforcement such standardless

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[8]NRS 201.300(1)(a)'s substitution of ''compels'' for ''coerces'' and addition of ''encourages'' and ''inveigles'' does not distinguish Ford's vagueness challenge from the unsuccessful challenges to 18 U.S.C. § 2242(b) in *Gagliardi*, *Hart*, and *Tykarsky*, particularly given our long adherence to the doctrine of *noscitur a sociis* (words are known by—acquire meaning from—the company they keep). *Orr Ditch Co. v. Dist. Ct.*, 64 Nev. 138, 146, 178 P.2d 558, 562 (1947). The argument that ''encourages'' does not require an object ignores its transitive use in NRS 201.300(1)(a)—(''encourages . . . a person . . . to become . . . or to continue''); its meaning, moreover, is distinct from ''persuades'' in that it encompasses situations in which the panderer's persuasive efforts fail. *See People v. Bradshaw*, 107 Cal. Rptr. 256, 258 (Ct. App. 1973).

discretion that it ''authorizes or encourages seriously discriminatory enforcement.'' *Williams*, 553 U.S. at 304. Ford's vagueness challenge therefore fails. *See also Guzzardo v. Bengston*, 643 F.2d 1300, 1303-04 (7th Cir. 1981) (rejecting vagueness challenge to Illinois pandering statute; the term '' 'arrange a situation in which a female may practice prostitution' evokes a rather clear image of what the legislature had in mind when the statute was enacted''); *State v. Lee*, 315 N.W.2d 60, 62 & n.1 (Iowa 1982) (upholding Iowa pandering statute against vagueness challenge because ''the terms 'persuades' and 'arranges' are common words that are easily defined. The statute gives fair warning that it prohibits affirmative acts designed to orchestrate for or induce another to practice prostitution.'') (collecting cases).

III.

[Headnote 15]

Ford offers a secondary, statutory argument. Whatever his intent and actions were, Ford argues, he could not violate NRS 201.300(1)(a) because his target, police officer Leesa Fazal, testified she would never ''become a prostitute'' and, never having been a prostitute, could not ''continue to engage in prostitution.'' In his view, NRS 201.300(1)(a) does not apply when the target is an undercover police officer. Alternatively, but for much the same reasons, Ford argues that the most he can be liable for is attempted pandering, not pandering.

[Headnote 16]

Ford conflates pandering, which is an inchoate crime of solicitation, with prostitution itself. ''[I]t is the defendant's intent that forms the basis for his criminal liability, not the victims'.'' *United States v. Rashkovski*, 301 F.3d 1133, 1137 (2002) (upholding conviction under 18 U.S.C. § 2422(a), formerly Mann Act § 3, against the argument that the defendant ''could not have induced or enticed the [Russian] women [he targeted] to travel 'to engage in prostitution' under § 2422(a) because [they] both declared on the stand that they had no intention of working as prostitutes once they reached the United States''). And the crime of pandering is complete based on the defendant's act of soliciting his target ''to become a prostitute'' or ''to continue to engage in prostitution.'' NRS 201.300(1)(a). Its commission does not require that the defendant's persuasion succeed:

> Under our statute the crime is complete when a person ''encourages a female person to become a prostitute.'' Success is not a necessary component of the crime. . . . It is the act of encouragement, persuasion or inveiglement which is forbidden.

State v. Gates, 221 P.2d 878, 880 (Utah 1950); *State v. Clark*, 406 N.W.2d 802, 805 (Iowa Ct. App. 1987) (''It is the recruiting and management activity, and not its success, which is the evil sought to be prohibited under a pandering statute.'').

A variant of the police-officer-as-target issue came before the California Supreme Court in *People v. Zambia*, 254 P.3d 965 (Cal. 2011). There, as here, the target of the defendant's attentions was an undercover police officer posing as a prostitute, whom the defendant allegedly recruited to come to work for him. *Id.* This led the defendant in *Zambia* to argue, among other things, that ''he could not be convicted of anything more than attempted pandering because there was no possibility that Officer Cruz would become a prostitute.'' *Id.* at 975 n.8. The court rejected the argument:

> the crime of pandering is complete when the defendant ''encourages another person to become a prostitute'' . . . . There is no requirement that defendant succeed. Nor is there a requirement that, in selecting his targets, the panderer choose only those who present a high probability of success. Again, the focus is on the actions and intent of the panderer, not the target.

Id. (citation omitted). Nor is it a defense that Ford thought Fazal was a prostitute when she was not. *See* 2 LaFave, *supra*, § 11.1(d) (''it is *not* a defense to a solicitation[-type crime] that, unknown to the solicitor, the person solicited could not commit the crime. The defendant's culpability is to be measured by the circumstances as he believes them to be.''); *Williams*, 553 U.S. at 300 (''As with other inchoate crimes—attempt and conspiracy, for example—impossibility of completing the crime because the facts were not as the defendant believed is not a defense[ ].'').

Further confirming that NRS 201.300(1)(a) applies to undercover sting operations is NRS 175.301, which, until 2005, 2005 Nev. Stat., ch. 113, § 1, at 308, required corroboration to convict a person of pandering. After this court reversed a pandering conviction under NRS 201.300, holding that one police officer could not corroborate another's testimony, *Sheriff v. Hilliard*, 96 Nev. 345, 608 P.2d 1111 (1980), the Legislature amended NRS 175.301(2) to add an exception to the corroboration requirement when ''[t]he person giving the testimony is, and was at the time the crime is alleged to have taken place, a police officer or deputy sheriff who was performing his duties as such.'' 1981 Nev. Stat., ch. 504, § 1, at 1029. Although the 2005 Legislature omitted pandering from NRS 175.301's corroboration requirement altogether, its quarter-century of dispensing with corroboration in pandering cases involving undercover police officer testimony cements our conclusion that NRS 201.300(1)(a) applies to undercover sting operations.

Indeed, as Ford but not his counsel argued in the district court, no facts appear to support giving an instruction on attempted pandering in this case. As a species of solicitation, the crime of attempted pandering would occur if an actor's message were uttered but didn't reach the intended target (assuming there was enough, otherwise, for the crime). 2 LaFave, *supra* § 11.1(c) (''What if the solicitor's message never reaches the person intended to be solicited, as where an intermediary fails to pass on the communication or the solicitor's letter is intercepted before it reaches the addressee? The act is nonetheless criminal, although it may be that the solicitor must be prosecuted for an attempt to solicit on such facts.''); *see* NRS 193.330 (attempt exists when ''[a]n act done with the intent to commit a crime, and *tending but failing* to accomplish it . . .'' (emphasis added)). But there are no facts like that here. Ford's message reached Fazal. The question is not whether he attempted to pander, but whether his words and conduct constitute the completed specific intent crime of pandering.[9]

IV.

[Headnote 17]

To combat Ford's constitutional challenges, the State readily concedes—in fact, affirmatively argues—that NRS 201.300(1)(a) requires specific intent. We agree, but the jury was not so instructed. The instructions the jury received simply reprised the requirements for general intent under NRS 193.190 (there must be ''a union, or joint operation of act and intention'' for ''every crime or public offense'') and NRS 201.300(1)(a)'s text. Even more confusing, the general intent instruction also addressed motive and admonished the jury that ''[m]otive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict.'' Combined with the lack of an instruction on specific intent, these instructions created the misimpression that Ford could be convicted based simply on a showing that he intended to speak the words he did, rather than that he spoke them specifically intending to persuade Fazal

[9]We decline to address Ford's equal protection challenge, which depends on matters not part of the record in the district court, and his objection on appeal to the use of a transcript to the admission of which he stipulated in the district court. As for the district court's admission of expert testimony concerning the pimping and prostitution culture and its code words, on the record presented we find no abuse of discretion, *see Stanifer v. State*, 109 Nev. 304, 306 n.1, 849 P.2d 282, 283 n.1 (1993), but caution that there are risks associated with and limits to the permissible use of such expert testimony. *See United States v. York*, 572 F.3d 415, 418-27 (7th Cir. 2009). We also reject Ford's argument that using his words to convict him violates the corpus delicti rule stated in *Hooker v. Sheriff*, 89 Nev. 89, 506 P.2d 1262 (1973), and thereby due process. *Hooker* addresses post-crime admissions or confessions, not crimes like pandering that target illegal solicitations.

''to become a prostitute'' or ''to continue to engage in prostitution.'' Although Ford did not object to the failure to instruct on specific intent, the error was plain, and the failure to give a specific intent instruction affected Ford's substantial rights. *See, e.g.*, *People v. Hill*, 163 Cal. Rptr. 99, 108 (Ct. App. 1980) (reversing pandering conviction because the jury was not instructed on specific intent). For this reason, we reverse and remand for a new trial.

SAITTA, C.J., and DOUGLAS, CHERRY, GIBBONS, HARDESTY, and PARRAGUIRRE, JJ., concur.